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A

ACKNOWLEDGMENT.

See CONVEYANCES, 9; EVIDENCE, 22, 26, 28; HUSBAND AND WIFE, 5.

ADMINISTRATION.

1. *Administrator — Note, suit on — Defense — Title.* — Where an administrator holds a note of his intestate, which was inventoried to himself, and accounts for it in full in his settlement with the estate, and no representative of the estate makes any complaint or seeks to charge an improper appropriation of the instrument, it becomes his property, at least as against the maker; and in suit against the latter on the note, a defense that it belongs to the estate, and that plaintiff has no title, is without merit.—Lyons v. Dougherty, 38.

2. *Administration — Administrator, liability of, for failure to obey order of sale made by Probate Court.* — An administrator who postpones a sale ordered by the Probate Court, unless for sound reasons, will be held responsible for any loss which may happen to the estate by reason of such delay. *Query:* whether he would be protected in such exercise of discretion if sound reasons apparently existed.—In the matter of Gorman's Estate, 179.

3. *Administration — Final settlement — Sale of land — Mortgage — Construction of statute — Subrogation.* — Where an administrator, under section 10, article II, of the administration act, sold the title of decedent as owner in fee simple of certain lands, and divided the proceeds in payment of the debts of his estate, the administrator cannot, in his final settlement, be compelled to *debit* himself with that portion of the proceeds paid to a creditor whose claim had already been secured by deed of trust on the land sold.

   In such case the creditor is not compelled to look to his deed of trust alone, but may satisfy his debt out of the general assets in the hands of the administrator.—Wilton v. Hull, 296.

4. The payment of the debt out of the general fund, by the administrator, did not extinguish the encumbrance upon the land. But on payment so made, the estate of the deceased became entitled to the amount thus paid, and the same may be recovered out of the lands in the hands of the purchaser at the administrator's sale, by an administrator *de bonis non*, for the benefit of the estate.—*Id.*

5. *Administration — Claim — Interest.* — Interest may be awarded on the amount claimed against the estate of a deceased person, although not called for in the notice presented to the administrator.—Harwood v. Larrimore, 414.

ADMINISTRATION—(*Continued.*)

6. *Administrator's sale of real estate, illegal, will yet give color of title.*—Where an administrator made a sale of real estate which was illegal, yet if all the parties thereto supposed that the sale and deed conveyed the title, such sale and deed gave color of title.—Crispen v. Hannavan, 536.

7. *Administration — "Family," who are — Construction of statute.* — The word "family," as used in the statute concerning the absolute property of the widow in cases of administration (Wagn. Stat. 88, §§ 33, 34), means children, or those persons who have a legal or moral right to expect to be clothed and fed by the widow, and does not include assistants or servants who may be necessary to keep the house or manage the farm.—Whaley v. Whaley, 577.

8. *Administration — Widow's right to possession of mansion house — Construction of statute.* — The statute (Wagn. Stat. 542, § 21) which provides that, until dower is assigned, the widow may remain and enjoy the mansion house of her husband without being liable to pay rent for the same, does not authorize her to hold it for any specific length of time.—*Id.*

9. *Administration — Practice — Allowance to widow, not a question for a jury.* — An application for allowance of absolute property to the widow under the statute (Wagn. Stat. 88, §§ 33, 34) is not a legal proceeding, but is a matter depending wholly upon the discretion of the court, and should not be submitted to a jury.—*Id.*

10. *Administration — Allowance of absolute property to the widow should not be a judgment against the executors.* — In an application for allowance of absolute property to the widow, it is erroneous to render judgment against the executors or administrators. The proper relief is an appropriation of assets in their hands.—*Id.*

11. *Limitations, statute of — Administrator — Heirs and distributees — Adverse title.* — When the administrator purchases or acquires title to property of an estate, and afterwards, with the knowledge of the heirs, notoriously asserts title in himself and claims adversely to the estate, he may avail himself of the statute of limitations against the heirs, and in the same manner against the distributees, from the date of final settlement and order of distribution.—Tapley v. McPike, 589.

12. *Administrators — Acts of, in good faith — Revocation of authority.* — The lawful acts of administrators, done in good faith, shall not be impeached by any will appearing, nor by any subsequent revocation or superseding of their authority.—*Id.*

See DOWER; LANDLORD AND TENANT, 3.

ADVERSE POSSESSION.

See LAND AND LAND TITLES; LIMITATIONS.

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AGENCY.

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2. *Agency — Authority of agent limited to the particular sphere of his employment.*—An agent authorized in the name of his principal, in connection

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with the particular business in which his agency was employed, to indorse drafts for collection and deposit on account of such business, or to indorse any draft drawn in favor of his principal in connection with that business, but who is not an unlimited agent, has no authority to indorse a draft not connected with said business, without the knowledge of his principal; and where the proceeds did not come into the hands of his principal, but passed to another party, the principal cannot be held responsible for such proceeds. —Chouteau v. Filley, 174.

See CARRIERS, COMMON, 2; CONTRACTS, 4; DAMAGES, 1; EQUITY, 11; EVIDENCE, 29; RAILROADS, 5; REAL ESTATE AGENT; SHERIFFS' SALES, 4; TRUSTS AND TRUSTEES, 7.

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ASSIGNMENT.
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1. *Lien—Judgments—Attachments—Priority—Stay of execution—Real and personal property.*—The lien of an attachment on lands, after judgment against the defendant on the plea in abatement, takes effect from the date of the levy of the attachment, and has priority over a junior judgment; and a stay of execution, under judgment on an attachment, does not have the effect of removing or postponing the lien as to lands. The lien is created by the levy of the attachment and fixed by the judgment. In cases of personal property the principle is different. There the lien arises out of the execution, and after levy the property is in the custody of the officer, and other parties

ATTACHMENT—(*Continued.*)
are precluded from taking or intermeddling with it. But if the plaintiff sees fit to direct the officer to hold up the judgment and not proceed to satisfy the writ, he cannot continue to hold the lien.—Ensworth v. King, 477.

ATTORNEY AT LAW.
1. *Attorney and client, communications between — Construction of statute.*— The rule which excludes testimony of professional communications between attorneys and clients is broad enough to embrace a case where the one seeking counsel pays no fee and employs other attorneys in the prosecution of the business, and even where the lawyer consulted is afterwards employed on the other side. The term "client," as used in the statute (Wagn. Stat. 1374, § 8), should be understood in its most enlarged sense, and the prohibition should close the mouths of all who have listened to disclosures looking to professional aid.—Cross v. Riggins, 335.
See EQUITY, 11; EXECUTION, 4.

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See LANDLORD AND TENANT, 6.

AUCTIONEERS.
1. *Auctioneer — Implied warranty — Bill of sale — Presumption derived from signature.*— The mere fact that auctioneers at the time of sale were acting as such is not of itself notice that they were not selling their own goods, and they must be deemed vendors, and responsible as such for the title of the goods sold, unless they disclose at the time of the sale the name of the principal. And the joint signature of the bill of sale by the auctioneer with the principal, will raise a presumption that the auctioneer acted also as principal, which cannot be contradicted by parol evidence that he did not sell or intend to hold himself responsible as principal.—Schell v. Stephens, 375.
2. *Warranty, verbal — Statute of frauds.*— The verbal warranty of an auctioneer, where he himself alone was trusted and expressly agreed for himself to warrant the title, is an original undertaking and not within the statute of frauds, and it may therefore be shown in evidence.—*Id.*

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BILLS AND NOTES.
1. *Bills and notes — Indorsement after maturity — Presentment — Notice — Diligence.*— The indorsement of a negotiable note after maturity is equivalent to the drawing of a new bill of exchange at sight, and the same diligence in making demand of and giving notice is required to charge the indorsers. Where such indorsement was on the 19th of April, and the demand and refusal occurred on the 3d of the following July, no excuse appearing for the delay, the indorsers would not be liable.— Leight v. Kingsbury, 331.
2. *Bills and notes — Collateral security — Offset.* — A note given for collection, and the amount of which, when collected, was to be credited upon

BILLS AND NOTES—(*Continued.*)

another note and held as an offset thereto, is merely a collateral security for the payment of the note last named, and not to be treated as payment of the same before the amount is actually collected. And where judgment on the collateral note is turned over to the maker of the principal one, and he gets the benefit of it, he is afterwards estopped from setting up such an offset.—Holmes, Adm'r, v. Leykins, 399.

3. *Promissory notes — Order by school director — Negotiability, etc.* —Suit was brought by the assignee upon the following instrument:

"Thirteen months from date, I, C. W. Larramore, director of sub-district No. 2," etc., "agree to pay to the order of W. A. Smith sixty-nine dollars for school merchandise furnished said sub-district, with ten per cent. interest from date; said sum to be paid out of any funds due said sub-district, payable at," etc. (Signed) C. W. LARRAMORE, Director.

"Accepted by M. G. Dale, County Clerk."

Held, that not being a personal obligation of its maker, and being payable out of a particular fund only, the paper was not negotiable, and equities arising between the original parties might be set up in its defense.

The fact of the acceptance does not make the order negotiable.—McGee v. Larramore, 425.

4. *Bills and notes — Contract — Consideration — Corrupt agreement no consideration for note — Trusts.*—A. being in embarrassed circumstances, under an agreement with his creditors, surrendered to B., who represented them, his whole stock of goods. B. then made an agreement with C., whereby C. was to take them and dispose of them and share the profits with B. For the declared purpose of leading the creditors to believe that the goods had been sold absolutely to C., and had only realized $900, when in fact they were worth much more, B. induced C. to execute a note to him for $900, which he promised to return when he had shown it to the creditors, but in fact retained the note, and brought suit against C. thereon. *Held*, that the arrangement between B. and C. amounted to a corrupt bargain to defraud the creditors of their just rights, and that the maxim *potior est conditio defendentis* applies, and that defendant was not bound to execute the corrupt bargain by payment of the note.—Harwood v. Knapper, 456.

5. *Promissory note — Accommodation maker — Signature in blank — Agreement.* —A. and B. were makers of a promissory note which had become due. C. signed in blank another note, with the understanding that it was to be signed also by A. and B. and used to pay the former note. A., however, filled up the note as payable to himself and assigned it over to B., who was aware of the understanding under which it was signed by C. B. subsequently brought suit against A. and C. on the note. *Held*, that A. and B. having violated the agreement under which C. signed the note, and B. having knowledge of that agreement, C. could not be held liable to B. on the note.—Wagner v. Diedrich, 484.

6. *Bills and notes — Draft, etc.*—An instrument of writing in terms as follows, viz: "Treasurer of St. Louis" * * * etc., "Railroad Company will pay to A., or order, $1,700.

"Done by order of the Board of Directors. B., President.

"C., Secretary.'

BILLS AND NOTES—(*Continued.*)

Was a bill or note for the direct payment of money, within the meaning of the statute, and the party suing upon it was entitled to default in case of failure to answer on or before the second day of the return term.—Gilstrap v. St. Louis, Macon & Omaha R.R., 491.

7. *Evidence—Bills and notes—Lack of consideration—Fraud.*—When, in a suit on his non-negotiable notes, the defendant alleges that the notes were a part of the purchase-money for certain real estate, which was conveyed to him by an alleged attorney in fact, and that the power of attorney was a forgery, such an allegation is a good defense.—Wheeler v. Standley, 509.

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See STREET IMPROVEMENT, 1.

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1. *Court, County—Railroads, subscription to—Agents—Bonds—Reasonable certainty—Statute, compliance with.*—Where a county issues its bonds to a railroad, if there was reasonable certainty in the manner of voting and ordering the subscription, and the subscription was made to the road authorized, and the other provisions of the statute were complied with, such bonds are valid.—Ranney v. Baeder, 600.

See SCHOOL FUNDS, 1.

BOND, INJUCNTION.

See PRACTICE, CIVIL—APPEAL, 2.

BOND, OFFICIAL.

See CONTRACTS, 1; JUDGMENT, 12; SHERIFF, 5.

BONDS, STATE.

See RAILROADS, 3, 4.

BONDS, TITLE.

1. *Title bond, violation of—Notes—Action, nature of.*—One who, having received a title bond for land, gives his purchase-notes therefor, and takes them back while the debt still remains, thereby forfeits his claim on the bond; and if he had paid any one of the notes, his action should be specifically for the amount paid, and not for violation of the contract.—Conley v. Doyle, 234.

BOONE COUNTY.

See PROBATE COURT OF BOONE COUNTY.

BOUNTY LAND.

See EVIDENCE, 22, 23, 26, 28.

C

CARONDELET, CITY OF.

1. *Lands and land titles—Carondelet, town of, deeds by—Evidence.*—Under the provisions of an act authorizing the corporation of Carondelet to sell and convey certain lots of ground, approved February 13, 1833 (2 Terr. Laws, 393), the town of Carondelet was expressly authorized to convey certain particular lots of ground therein mentioned, and a conveyance executed pursuant to that law is admissible in evidence.—Henderson v. Dickey, 161.

CARRIER, COMMON.

1. *Carrier, common — Receipt, effect of.* — A receipt for goods, given in the usual form by a common carrier, implies an agreement to transport the goods to their destination if upon the carrier's line.—Landes v. Pacific R.R., 346.

2. *Carriers, agency of — Shipments by usual channels, when none are named — Effect of.* — Where goods are ordered and no specific instructions are given in regard to the shipment — there being a regular carrier, such as a railroad running between the two places — a delivery, with proper directions, to such carrier, for the purchaser, is held to be a constructive delivery to him; and the goods become at once his, subject only to the right of stoppage *in transitu*. But the goods must be forwarded through the usual channels, and channels supposed to be in contemplation of the purchaser.—Comstock v. Affoelter, 411.

3. *Railroads — Common carriers — Half-fare tickets — Reasonable regulations must be complied with by passengers.* — A railroad company is under no general obligations to carry any one for less than the usual rates, and if it does so for special accommodation, any reasonable condition imposed upon the passengers should be performed; and if such passengers neglect to perform such conditions they cannot complain if the regular fares are demanded.—Goetz v. Hann. & St. Jo. R.R., 472.

See RAILROADS.

CERTIORARI.

See REVENUE, 1, 2, 4.

CHARITABLE DEVISES AND DEDICATIONS.

See EQUITY, 7, 8; LIMITATIONS, 5, 6.

CHATTEL MORTGAGE.

See MORTGAGES AND DEEDS OF TRUST.

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See PRACTICE, CIVIL, 1.

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See BILLS AND NOTES, 2.

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See LIMITATIONS, 10, 11, 12, 14, 15.

COMMISSIONER, COUNTY.

1. *County, commissioner of — Deed by — Construction of statute.* — A deed made by a county seat commissioner need not recite the authority of the officer. If it appear on the face of the instrument that it was made by him as commissioner, the requirement of the statute (Wagn. Stat. 397, § 14) is met. Such a conveyance can only be a quit-claim deed; and a covenant of warranty would not bind the county.—Henry v. Atkinson, 266.

COMMON-FIELD LOTS.

See LAND AND LAND TITLES, 2. 3 4.

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See PRACTICE, CRIMINAL, 7.

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See JUDGMENT, 4, 5.

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See BILLS AND NOTES, 4, 7; CONTRACTS; CONVEYANCES, 10; EVIDENCE, 12.

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See MORTGAGES AND DEEDS OF TRUST, 11.

CONSTABLE.

1. *Constable, bond of, action on — Execution, failure to return.* — In suit on a constable's bond for failure to return an execution, it is sufficient for plaintiff to show that the execution was delivered to defendant; and it is not necessary, in order to make out plaintiff's case, to show the failure to return it.—State, to use, etc., v. Schar, 393.

CONSTITUTION OF MISSOURI.

See CONTRACTS, 1, 2; CORPORATIONS, 1; COURT, PROBATE, 1; PROBATE COURT OF BOONE COUNTY, 2, 4, 5, 6; SHERIFF, 1; TRUSTS AND TRUSTEES, 6.

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See PRACTICE, CIVIL—PLEADING, 14

CONTRACTS.

1. *Constitution—Contract, impairing obligation of — Missouri State lottery—Right to sell tickets, continued how long.*—The transfer of the Missouri State lottery to Gregory in June, 1842, constituted a valid contract which could not be impaired by the act of December, 1842, prohibiting the sale of lottery tickets in this State. And the right to sell the lottery tickets did not cease when the total net profits of the concern amounted to $15,000 — the sum authorized by the act of January, 1833, to be raised for the railroad to New Franklin — but continued until the last installment due for the use of the town of New Franklin had become due and payable.—State v. Miller, 129.
2. *Constitution — Contracts, acts impairing obligation of.*—Where a contract, when made, is valid by the laws of the State as then expounded by the departments of government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the Legislature, or decision of its courts, altering the construction of the law.—*Id.*
3. *Contract — Written agreement not varied by parol, when* — Evidence of a parol agreement is not made inadmissible as varying the terms of a written contract, where that portion of the instrument bearing upon the subject-matter of the parol agreement had been purposely erased by the parties.—Letcher v. Letcher, 137.
4. *Sale of lands — Agency — Suit at law for balance — Statute of frauds — Parol evidence.* — Land was conveyed by deed absolute on its face, and for an alleged valuable consideration, but in fact without consideration, with a verbal agreement that the grantee should sell the land as agent for the grantor and account for the proceeds. *Held*, that the agreement, not being in writing, as required by the statute of frauds (Wagn. Stat. 655, § 3), could not be carried out, and could not be shown in evidence for that purpose. But the agreement would raise an implied trust in the grantee to account for the land and its proceeds to the grantor, and proof of the bargain as shown the last named trust would be competent under the statute of frauds. That act contemplates express and not implied trusts. In such case the grantor might sue for the recovery thereby of the balance of proceeds in the hands of the grantee, declaring upon the agreement merely as inducement, and the cause would be properly submitted to the jury.—Peacock, Adm'r of Maddox, v. Nelson, 256.

CONTRACTS—(*Continued.*)

5. *Contracts — Damages for work not performed, when recoverable.* — It is only where a party to a contract has been prevented from its performance by the wrongful act of the other that he is entitled to recover damages for profits which he would have realized if he had completed it. A simple breach of contract on the part of the other party would not authorize him to stop work and recover for the unperformed work. It might justify him in abandoning his contract and entitle him to recover for the work already done. To entitle him to such recovery he must be prevented from proceeding with the work by the unauthorized interference of the other party.—Fitzgerald v. Hayward, 516.

6. *Contracts — Time, when of the essence of the contract, must not be ignored by instructions.* — Where the contract for the performance of certain work provided for the use of sufficient force and speed to complete the work by a specified time, and that if such force and speed were not used, and the work was not done in said time, the other party might take possession of said work and complete it, and forfeit the contract—*held*, that time was of the essence of the contract, and in a suit by the contractor for the estimated profits of the unperformed work, instructions which ignored the element of time and placed the right of recovery for such work on the simple fact that defendant entered upon said work and prevented him from performing it, are bad.—*Id.*

See AGREEMENT; BILLS AND NOTES; BONDS, STATE; BONDS, TITLE; CARRIER, COMMON, 1; CONVEYANCES; EQUITY, 1, 2, 3, 11, 12; INSURANCE, FIRE; INSURANCE, LIFE; LANDLORD AND TENANT, 2, 3, 4, 5; MORTGAGES AND DEEDS OF TRUST; RAILROADS, 6, 7; REAL ESTATE AGENT, 1; STREET IMPROVEMENT, 1; TRESPASS, 1.

CONVEYANCES.

1. *Married women* — Jus disponendi. — A married woman will have the uncontrolled disposition of property left to her sole and separate use, notwithstanding the fact that the mode of its disposition is by the terms of the deed made specific, as by a writing signed and witnessed by two witnesses, or by devise. She is not restricted to that mode, but may adopt any other method known to the law, unless affirmatively confined to the one named.—Green v. Sutton, 186.

2. *Deeds — Life estate — Remainder* — Habendum. — If a deed embrace inconsistent provisions, some indicating a power of absolute disposal, which can only be had by the holder of the fee, and others creating a remainder which supposes a life estate, the words of the *habendum* clause should control, and there can be no remainder.—*Id.*

3. *Deeds — Conveyance, with power of disposition.* — A conveyance coupled with a distinct and naked power of disposition always carries the fee, unless such conveyance be made by express words to vest an estate for life only. (On this proposition Adams, J., expressed no opinion.)—*Id.*

4. *Lands and land titles — Life estate — Limitation over.* — There cannot be a limitation over, after the death of a tenant for life, to the heirs of one then living. And in construing a deed made to A., with remainder over to the heirs of B., where it was doubtful whether the grantor intended conveying to A. an estate in fee simple or for life, the former intention might be inferred from the chance that B. would perhaps survive A., and so the estate might

CONVEYANCES—(*Continued.*)
lapse; and in determining this question, it would be immaterial whether A. held the legal or the equitable estate.—*Id.*

5. *Sale of lands—Agency—Suit at law for balance—Statute of frauds—Parol evidence.*—Land was conveyed by deed absolute on its face, and for an alleged valuable consideration, but in fact without consideration, with a verbal agreement that the grantee should sell the land as agent for the grantor and account for the proceeds. *Held*, that the agreement, not being in writing, as required by the statute of frauds (Wagn. Stat. 655, § 3) could not be carried out, and could not be shown in evidence for that purpose. But the agreement would raise an implied trust in the grantee to account for the land and its proceeds to the grantor, and proof of the bargain as showing the last named trust would be competent under the statute of frauds. That act contemplates express and not implied trusts. In such case the grantor might sue for the recovery of the balance of proceeds in the hands of the grantee, declaring upon the agreement merely as inducement, and the cause would be properly submitted to the jury.—Peacock, Adm'r of Maddox, v. Nelson, 256.

6. *County, Commissioner of—Deed by—Construction of statute.*—A deed made by a county seat commissioner need not recite the authority of the officer. If it appear on the face of the instrument that it was made by him as commissioner, the requirement of the statute (Wagn. Stat. 397, § 14) is met. Such a conveyance can only be a quit-claim deed; and a covenant of warranty would not bind the county.—Henry v. Atkinson, 266.

7. *Lease, description in, when not void for uncertainty*—Certum est quod, *etc.*—A deed conveying "the dwelling-house now occupied by me, with the usual appurtenances, the well, the smoke-house and garden, together with one-half of the land now in cultivation on the farm now occupied by me, and one-half the orchard and one-half the barn," is not void by reason of its defective description. It sufficiently identified the farm, and parol evidence was proper in order to locate it. Such testimony would not vary or contradict the terms of a written instrument.—Means v. La Vergne, 343.

8. *Conveyance by heirs, effect of, against that of ancestor.*—Upon the death of the owner of land, a conveyance thereof by his heirs to an innocent purchaser for value will carry the title as against an unrecorded conveyance of the deceased owner.—Callaway v. Fash, 420.

9. *Conveyances—Acknowledgment—What defective.*—An acknowledgment purporting to be made before a clerk of a foreign city, and which fails to state that the grantor was known to the officer granting the certificate to be the person whose name was subscribed to the instrument as a party thereto, is bad.—*Id.*

10. *Conveyances—Covenants of warranty—Absence of fraud—Possession of the property.*—When there is no fraud, and a party receives a conveyance with covenants of general warranty, he cannot retain possession, and set up failure of consideration when sued for the purchase-money.—Wheeler v. Standley, 509.

11. *Lands and land titles—Conveyances—Description—Latent ambiguity—Parol evidence—Recorded map or plats.*—Parol testimony is admissible to explain a latent ambiguity in a deed. And where the owner of land had it laid out in lots fronting on one street, and a map of such division acknowl-

CONVEYANCES—(*Continued.*)
edged and recorded, but, before selling any lots, made a new division of the same land into lots fronting on a different street, but recorded no map of the new division, and afterwards sold some of the lots by numbers only, parol evidence was admissible to show that the lots sold were according to the last map, and not the one on record.—Schreiber v. Osten, 513.

12. *Tenants in common — Conveyance by metes and bounds, validity of — Statute of partitions.* — A conveyance of his interest by metes and bounds by a tenant in common is valid, even as to his co-tenant. The statute of partitions prevents any injustice.—Barnhart v. Ellis, 597.

See EVIDENCE, 22, 24, 35; HUSBAND AND WIFE, 5, 6, 7; RAILROADS, 6, 7; SALES, JUDICIAL; SHERIFF, 2, 4; SHERIFFS' SALES, 2, 3, 45.

CORPORATIONS.

1. *Constitution — Corporations — Double liability of stockholders.*— A stockholder in a corporation is not liable for double the amount of his stock (see State Const., art. VIII, § 6, and Wagn. Stat. 291, § 13) on execution against the company, the execution having been levied, after his stock has been transferred on its books and the transfer is in all respects complete.—Miller v. Manion, 55.

2. *Corporations — Transfer of stock — Insolvency of purchaser.* — Where, before execution against a corporation, the stockholder, honestly and without any intention to defeat the creditors of the company, sells and transfers his stock, the mere fact that the purchaser was insolvent at the time is not sufficient to hold such stockholder still liable for the debts. The question in such cases is, whether the transfer was fraudulent and void as to creditors of the company. If the stockholders knew of the insolvency at the time of the transfer, it would be very strong evidence of fraud.— *Id.*

See RAILROADS; RAILROADS, STREET; REVENUE, 6.

COURT, CIRCUIT.

1. *Courts, judicial — Abolition, etc.— Semble,* that the abolition or alteration of a judicial circuit will not abolish the office of the circuit judge.— State ex rel. Vail v. Draper, 353.

2. *Courts — New circuits, acts creating — Judge — Commission — Salary —* Mandamus.— When the number used in designating a judicial circuit is also used in the commission issued to the judge, although the boundaries of his circuit are not designated, he is thereby constituted the judge of the territory which elected him. And the passage of an act of the Legislature constituting the same territory a new circuit denominated by a different number, and the appointment of another judge to preside over the circuit so designated, will not have the effect of vacating his office or invalidating his commission. And the judge originally commissioned will be entitled to *mandamus* against the State auditor in case of his refusal to issue a warrant for the proper salary, notwithstanding such legislation and appointment.— *Id.*

3. *Circuit Court, record of — Index, compensation for making* — Mandamus. — In 1869 the Circuit Court of Cole county had no authority to order the making of an index of the records of the court; and even if it had the authority, it had no power to fix the compensation for such services. The County Court is the proper tribunal to adjudicate that question in the first instance. Hence, claimant having another remedy, *mandamus* will not lie to compel the

COURT, CIRCUIT—(*Continued.*)

County Court to audit the claim for payment simply on the strength of such order.—Ward v. Cole County Court, 401.

4. *Courts, Circuit — Jurisdiction — Irregular proceedings, when valid.* —The Circuit Court is a court of general jurisdiction, and when it has acquired urisdiction, however erroneous or irregular its proceedings may be, they are egarded as valid and binding until they have been reversed or annulled by suitable proceedings instituted for that purpose; and titles acquired by sales under them will be protected.—Castleman v. Relfe, 583

See LIMITATIONS, 20; SALES, JUDICIAL, 2.

COURT, COUNTY.

See BONDS, COUNTY, 2; COURT, CIRCUIT, 3; DRAM-SHOPS, 1; LAND AND LAND TITLES, 19; LIMITATIONS, 20; MANDAMUS, 3, 4; PRACTICE, CRIMINAL, 10; RAILROADS, 5; WILLS, 3.

COURTS, PROBATE.

1. *Probate Courts, special acts touching, constitutional — Not judicial.*— The establishment of courts of inferior jurisdiction by special legislation, is a matter resting in the discretion of the general assembly. (Att'y-Gen'l ex rel. Boone County Court, *ante*, p. 317.)

Such acts are not in the nature of judicial sentences. Such courts and offices are statutory, and within the complete control of the Legislature to repeal, abolish or destroy them.—State ex rel., etc., v. Pinger, 486.

See ADMINISTRATION; PROBATE COURT OF BOONE COUNTY; SALES, JUDICIAL, 3; WILLS.

COURT, SUPREME.

See MANDAMUS, 2; PRACTICE, SUPREME COURT.

COURT, UNITED STATES.

See LAND AND LAND TITLES, 11.

COURT, UNITED STATES SUPREME.

See PRACTICE, SUPREME COURT, 2.

COUNTIES.

See COMMISSIONER, COUNTY, 1; SCHOOL FUNDS, 1.

CRIMES AND PUNISHMENTS.

See PRACTICE, CRIMINAL.

CRIMINAL LAW.

See PRACTICE, CRIMINAL.

D

DAMAGES.

1. *Damages — Negligence — Agency — Responsibility of employer for injuries done by his servant, how determined.*—A principal is civilly liable for the neglect, fraud, or other wrongful act of his agent in the course of his employment, although the principal did not authorize the specific act; but the liability is only for acts committed in the course of the agent's employment. A master is not responsible for any act or omission of his servants which is not connected with the business in which they serve him, though in general he is responsible for the manner in which they execute his orders, and for their negligence in selecting means by which the orders are to be carried out.

DAMAGES—(*Continued.*)

In determining whether a particular act is done in the course of a servant's employment, it is proper first to inquire whether the servant was at that time engaged in serving his master. If not, the master is not responsible, even though the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master. But if the acts are done in the course of the servant's employment, the master is liable for them, although the servant has acted injudiciously and negligently, and even though he disobeyed instructions.— Garretzen v. Duenckel, 104.

2. *Damages — Negligence — Street car — Passenger — Front platform.* — At common law, the fact that a street railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, will not absolve the company from liability for injuries there received by him.— Burns v. Bellefontaine Railway Co., 139.

3. *Damages — Employer and contractor — Excavation — Trespass.*— Where a contractor, under orders from his employer, attempted to erect a building having a width of sixty-five feet where the building space was but sixty-four feet six inches, and in so doing encroached upon his neighbor's wall, the employer was a co-trespasser, and as responsible as though he himself had made the excavation.—Williamson v. Fischer, 198.

4. *Action for damages by employee — Negligence of employer — Contributory negligence.*— If the principal has been guilty of fault or negligence, either in providing suitable machinery, or in the selection or employment of agents or servants, and injuries arise in consequence, he must respond in damages. But when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment, he assumes the risk and cannot hold his employer for the consequences.—Devitt v. Pacific R.R., 302.

5. *Damages — Crop — Trespass — Measure of damages, etc.*— The grantee of land has no title to a crop cultivated and removed therefrom by a third person. The latter would be a trespasser, but the value of what he removed would not be the measure of damages, and while he harvested the crop he held the actual possession; and, in case the grantee took possession, could have ousted him by an action of forcible entry and detainer, notwithstanding the fact that the person harvesting was a trespasser.— Jenkins v. McCoy, 348.

6. *Railroads — Damages — Delay — Locomotive, etc.*— In an action against a railroad company for damages resulting from its delay in forwarding stock, it is no defense that the delay was caused by the lack on the part of the company of proper appliances for transportation.— Tucker v. Pacific R.R., 385.

7. *Damages — Railroads — Negligence — Trespasses — Contributory negligence.* — Railroad companies are under the same obligations with other persons to use their own property so as not to hurt or injure others, and though a person be injured while unlawfully on their track, or contributes to the injury by his own carelessness or negligence, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, they are liable for damages for the injury.— Brown v. Hann. & St. Jo. R.R. Co., 461.

8. *Railroads — Public and private crossings — Use of the track.*— A railroad company has a right to stop its train at a public crossing for a reasonable time for proper purposes, but passengers are not obliged to wait until the

DAMAGES—(*Continued.*)

train is removed; and if the passengers are obliged to cross at other points than the public crossing on account of such obstruction, the company is bound to use ordinary care and diligence to prevent injuries to them; and when persons were in the habit of crossing the track at another than the public crossing, the agents and servants of the company were bound to take notice of the fact and use a precaution commensurate with it.— *Id.*

9. *Damages — Negligence — Weight of testimony — Appeal.*— In this State the question of negligence is a question of fact to be submitted to the jury, and the Supreme Court will not decide upon the weight of evidence in such cases.— *Id.*

See CONTRACTS, 5; LANDLORD AND TENANT, 1, 4; LIBEL, 2; PRACTICE, SUPREME COURT, 6, 9, 10; RECOUPMENT, 1.

DELIVERY.

See CARRIER, COMMON, 2; EVIDENCE, 35.

DESCRIPTION.

See CONVEYANCES, 7, 11; EVIDENCE, 31.

DOWER.

1. *Dower, sale of — Proceeds, to whom belonging after widow's death.*— Proceeds derived by a widow from sale of her life interest in the land of her husband, and left at her death, should not be treated as a part of the remainder to be distributed among the heirs of her husband. It was her absolute property, and neither she nor her legal representatives were chargeable with it.— State, to use of Pickey, v. Culbertson, 341.

2. *Dower — Election — Interest of widow in lands under.*—Where, under the provisions of the third section of the dower act of 1845 (R. C. 1845, p. 430, §§, 3, 5 and 6), a widow elected to take one-half of the real estate in lieu of dower, and no division of the land was had, the election vested in the widow an undivided half of all the real estate of which her husband died seized, subject to the payment of debts.—Matney v. Graham, 559.

See ADMINISTRATION.

DRAM-SHOPS.

1. *Criminal law — Dram-shop license — County Court — Indictment.*—Where a town charter contains nothing which excludes the right of the County Court to demand a license for selling liquor from the keeper of a dram-shop, he is not protected from indictment by a town license, but must also take one out from the County Court.—State v. Sherman, 266.

DYING DECLARATIONS.

See PRACTICE, CRIMINAL, 8, 9.

E

EASEMENTS.

See LAND AND LAND TITLES, 14, 15.

EJECTMENT.

1. *Forcible entry and detainer — Rents and damages — Cross-action of ejectment by defendant in — Forcible entry — Rule of damages in.*—A. having leased certain premises to B., forcibly dispossessed him before the expiration of the lease. B. having sued him for possession in forcible entry and detainer,

EJECTMENT—(*Continued.*)

held, that A. could not claim rents or damages by way of offset in that suit, but must submit to the judgment of the court; that is, restore the property and pay the damages and rents allowed by the judgment. He might then bring his action of ejectment, laying his ouster prior to the time he dispossessed B.; and in such suit he would be entitled to recover the premises and damages for their detention from the time of such ouster. He would also be entitled to the rents due him under the lease, and rent after the expiration of the lease up to the time the property was restored to him. But where defendant in the forcible entry suit died before the property was restored, and the judgment was presented for allowance before the Probate Court, all just claims for rents and damages should be allowed.—Robinson v. Walker, 19.

2. *Practice, civil — Pleading — Equity — Ejectment — Mingling of equitable and legal causes of action in the same count improper — Such causes may be embodied in the same petition.*—It is improper to mingle a cause of action which is purely equitable with one that is strictly legal in the same count in a petition, and proceed to try them together before a chancellor. But it does not therefore follow that in all cases a party must first get his decree for title and then bring a separate and independent action in ejectment to obtain possession. A plaintiff may unite in the same petition several causes of action, whether they be legal or equitable or both, if they arise out of the same transaction and are connected with the same subject of action. But when causes of action are thus united they must be separately stated, with the relief sought in each cause of action, in such manner that they may be intelligibly distinguished, for they require separate trials and separate judgments. Their joinder in the same count would be fatally defective. (Wagn. Stat. 1012, § 3; Peyton v. Rose, 41 Mo. 257, cited and explained.)—Henderson v. Dickey, 161.

3. *Ejectment — Deeds, loss of — Equity.* — Plaintiff may sue directly in ejectment for the possession of property, although his suit is based upon lost instruments. He need not in the first instance resort to a bill in equity to prove the making and loss of the deeds.—Donaldson v. Williams, 407.

4. *Ejectment — Outstanding title, proof of.* — It is sufficient for defendant in ejectment to show title in another, without establishing his own.—Callaway v. Fash, 420.

See EVIDENCE, 34; LIMITATIONS, 2.

EQUITY.

1. *Equity—Fraudulent conveyance — Vendee, offset by — What not permitted.* —Where a creditor purchases the land of his debtor at sale under execution, and brings suit against the debtor and a third party to set aside as fraudulent a conveyance of the land from the former to the latter, no principle of equity will permit the fraudulent grantee to offset against the value of the property the amount he may have paid for it. The fraud renders the deed absolutely void as to creditors, and plaintiff is entitled to recover the property and its rents, etc., as though no such fraudulent deed ever had been made.—Allen v. Berry, 90.

2. *Assignment, fraudulent — Action by creditors touching — Estoppel* in pais. —Where the motives of the assignor in making an assignment of his stock in trade were evidently to hinder and delay his creditors, and the assignee had notice of such motives, although the designs of the assignee may not have been fraudulent, yet the creditors would be at liberty, within the period

EQUITY—(*Continued.*)

allowed by the statute of limitations, to treat the sale as a nullity, as against their demands, and by attachment, or other proper proceedings, to subject the property thus sold to the payment of their debts. But where the creditors fail to pursue such a course, but lie quietly by and suffer the assignee to carry on the business in his own name and with his own money and credit, to sell out and replenish the stock, and engage in other transactions based on their acquiescence, the sale becomes as valid as though no fraudulent motives had entered into it. The assignment was not such a transaction as made the assignee a mere trustee for the assignor. As between the parties it passed the title.—Bobb v. Woodward, 95.

3. *Trust — Fraudulent transfer and purchase — Conveyance to family.* — It has become the settled law of Missouri, that upon lands held by a third person in fraud of creditors for the benefit of the debtor, or fraudulently purchased with the money of the debtor and conveyed to his family, there is a resulting trust to the debtor for the benefit of the creditors, which may be sold on execution.—*Id.*

4. *Fraudulent conveyances — Property purchased by an insolvent with his own money, in the name of another, void as to purchasers.* — If a person who is insolvent or in failing circumstances purchases property with his own money, and has it conveyed by his vendor to a third party, that conveyance is void as to subsequent purchasers of the property from the insolvent. The property continues to be his, and if he conveys it his vendee will acquire a good title. —Henderson v. Dickey, 161.

5. *Equity — Decree may be for any relief consistent with the allegations of the pleading.* — Under our statutes the court in an equity case may give any relief consistent with the allegations in the pleading, without regard to what is asked.—*Id.*

6. *Practice, civil—Pleading—Equity—Ejectment—Mingling of equitable and legal causes of action in the same count improper — Such causes may be embodied in the same petition.* — It is improper to mingle a cause of action which is purely equitable with one that is strictly legal in the same count in a petition, and proceed to try them together before a chancellor. But it does not therefore follow that in all cases a party must first get his decree for title and then bring a separate and independent action in ejectment to obtain possession. A plaintiff may unite in the same petition several causes of action, whether they be legal or equitaule or both, if they arise out of the same transaction and are connected with the same subject of action. But when causes of action are thus united they must be separately stated, with the relief sought in each cause of action, in such manner that they may be intelligibly distinguished, for they require separate trials and separate judgments. Their joinder in the same count would be fatally defective. (Wagn. Stat. 1012, § 3; Peyton v. Rose, 41 Mo. 257, cited and explained.)—*Id.*

7. *Equity — Trusts — A charitable devise will be carried into effect by a court of equity according to its intent.* — The jurisdiction of courts of equity over charitable devises and bequests is derived from their general authority to carry into execution the trusts of a will or other instrument according to the intention as expressed by the donor; and if the charity cannot be carried out in the exact mode indicated by the donor, or if that mode should become by subsequent circumstances impossible, the general object is not to be

EQUITY—(*Continued.*)
defeated if it can in any other way be obtained.—Academy of Visitation v. Clemens, 167.

8. *Equity—Charitable bequests of lands intended to last forever cannot be defeated by the heirs at law of the donor.*—Where lands are vested in a corporation by devise for charitable purposes, and it is contemplated by the donor that the charity should last forever, the heirs can never have the lands back again. If it should become impossible to execute the charity as expressed, another charity will be substituted by the court so long as the corporation exists.—*Id.*

9. *Equity—Guardian and Ward—Will—Donation to guardian—Undue influence—Presumptions of, how overthrown.*—Any one occupying a fiduciary relation so recently that the influence arising therefrom is presumed still to exist, cannot avail himself of bounty from his late ward, or other persons holding the relation, unless there is clear and distinct evidence that the influence has determined, and that the donor acted in a manner perfectly free, independent and unbiased; and the beneficiary must, in all instances, furnish this evidence. And the rule holds notwithstanding the fact that such proof is difficult, and perhaps almost impossible, to attain.—Garvin's Adm'r v. Williams, 206.

10. *Equity—Bill to set aside conveyance—Land bought with money of wife—Husband's consent, etc.*—The husband has a right, if he chooses, to give real estate to his wife, although paid for entirely by himself, and his consent that she shall receive the deed to herself will show his intention in that regard. But in the absence of any proof of such intent, if it shall appear that the property is purchased with the money of the wife, whether her sole and separate estate, or simply assets which the husband had the power to appropriate to his own use, the wife should not be divested of it. The husband's consent will be presumed, and even without it the title is properly in the wife.—Smith v. Smith, 262.

11. *Contracts—Specialty—Attorney in fact—Execution—Equity.*—An agreement under seal by an attorney for a principal, although inoperative at law for want of a formal execution in the name of his principal, is binding in equity if the attorney had authority.—Kearney v. Vaughan, 284.

12. *Chancery, court of—Sale of estate of minors not a nullity*—Chancery proceedings to sell the estate of minors, although instituted prior to the act of 1861 (Sess. Acts 1860-61, p. 98), were not void in the sense of being a nullity, even if the court went beyond its powers. Chancery courts have always had jurisdiction over the estates of minors. And if they exceed their powers under the law, such excess is not a naked assumption of power, as might be the case if the tribunal had no jurisdiction. Their action in such cases not being a nullity, but, if void, only relatively so, strangers cannot disregard it.—*Id.*

13. *Equity—Purchasers, innocent.*—A purchaser of land who buys of one who, as he supposes, has the legal title, but who informs him that even if it be so, he does not own the property and makes no claim to it, and for a nominal consideration obtains from him a quit-claim deed, cannot be called an innocent purchaser, and cannot be protected either in equity or under the registration act.—*Id.*

14. *Mortgages and deeds of trust—Mortgage with power of sale—Purchase by mortgage at his own sale—Equity of redemption.*—The principle is

EQUITY—(*Continued.*)

well established that when a power of sale is contained in a mortgage, and a sale made by virtue of such power, and the mortgagee becomes the purchaser, the equity of redemption still subsists and attaches to the property in favor of the mortgagor; and if at such sale the mortgagee acquires the title through the agency of a third person, the title will not be in anywise altered, but the right of the mortgagor will remain the same.—McNees v. Swaney, 388.

15. *Mortgages and deeds of trust — Conditional sale—Agreement as to time of sale — Equity of redemption.*— Where A., being indebted to B., made a mortgage with power of sale to B. to secure the debt, and at maturity A. was unable to pay, and on account of extraneous circumstances it was considered by both that the matter would be more secure if the mortgaged property was sold and the title vested in B.; and it was thereupon agreed that B., the mortgagee under the power, should sell the premises, and that C. should buy them in, and immediately convey to B., and that A. should have one year in which to pay the debt, and again obtain title to the property, and meanwhile should remain in possession, pay the taxes and have the use of the property; *held*, that the sale was not intended to and did not destroy A.'s equity of redemption. The purchase by C. was, in effect, a purchase by B., and B. therefore, being a purchaser at his own sale, the law gave A. the right to redeem, and the agreement did not in any way impair the respective rights of the parties. Such a transaction had none of the elements of a conditional sale. B. did not stand in the position of a person holding the absolute title and agreeing to convey upon certain conditions. He promised the naked legal title, while the equity was in A.—*Id.*

16. *Ejectment—Deeds, loss of—Equity.*—Plaintiff may sue directly in ejectment for the possession of property, although his suit is based upon lost instruments. He need not in the first instance resort to a bill in equity to prove the making and loss of the deeds.—Donaldson v. Williams, 407.

17. *Equity — Decree for title — Trusts — Minors, protection of.*—Where a father conveyed most of his land absolutely by deed of gift to his son, but it appeared by parol evidence that he relied upon this grantee not to "defraud his brother and sister," and the grantee, the deeds being lost, seeks a decree for title, and one of the *cestuis que trust* is still a minor, this court will protect such minor, and the decree will not be granted until a satisfactory provision is made for such minor.—Phillips v. Phillips, 603.

See INFANTS; LAND AND LAND TITLES, 16; LIMITATIONS, 8, 9; PARTNERSHIP, 2, 3; PRACTICE, CIVIL — ACTIONS, 9; PRACTICE, CIVIL—PLEADING, 3; TRUSTS AND TRUSTEES.

ERROR, WRIT OF.

1. *Writs of error — Record — Exceptions and motions — Statutes of amendments* — Jeofails.— When a case is brought up without any exceptions or motions in arrest or for new trial, this court can only look at the record proper for error, and can reverse only for such as are not cured by the statutes of amendments.—Miller v. Davis, 572.

2. *Writs of error — Record — Pleadings — Reversal of judgments.*— Where plaintiff shows by his own petition that he has no standing in court, but yet obtains judgment against the defendant, that is an error for which the judgment must be reversed.—*Id.*

ESTOPPEL.

1. *Estoppel — Privity of estate.* — Where the owner of land would be estopped, by reason of his own acts and conduct, from setting up title thereto, those in privity with him, unless purchasers for value without notice, labor under a similar disability.— Thistle v. Buford, 278.

2. *Mortgages and deeds of trust — Equity of redemption — Estoppel—Silence of party claiming interest.*— Where a party claiming an interest in land lies by for a great number of years and sees it enhanced in value and improved by the labor and expenditures of others, the courts will not listen favorably to his demands; and where the person claiming the interest was a mortgagee of the property, and had acquired the interest by a purchase at his own sale, and there is not such want of diligence in the mortgagor as would work a forfeiture by lapse of time, and the mortgagor has not apprehended that he is in danger of losing his property and has been lulled into security by the representations of the mortgagee, the equity of redemption still continues, and the sale does not vest the absolute title in the mortgagee.— McNees v. Swaney, 388.

3. *Lands and land titles — Fraud — Estoppel — Vendee can deny his vendor's title.* — A. was in possession of certain land under title from C., when B. entered upon it, falsely claiming that he had a tax-title, while in fact he had none, and the land had been redeemed, which fact of redemption he concealed from A. B. subsequently made a quit-claim deed to A. under such false representations and concealment, and took a deed of trust to secure the consideration thereof; the land was sold to B. under the deed of trust, and he sued A. for possession. *Held*, that A. had not so admitted B.'s claim as to be estopped from denying it — first, because the claim was a fraudulent one and was not made in good faith; second, because the grantee in a deed holds adversely to the vendor, and may strengthen his title from any other source. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession.— Mattison v. Ausmuss, 551.

See EQUITY, 2; HUSBAND AND WIFE, 6; LAND AND LAND TITLES, 18.

EVIDENCE.

1. *Witnesses — Retrial — Evidence of parties preserved in bill of exceptions — Competency of survivor as witness at second trial.*— Where the testimony of both parties, given at the first trial of a cause, is preserved in a bill of exceptions, the minutes of the testimony of either party so recorded may be given in evidence at the second trial, in case of his death in the mean time; consequently the surviving party may then testify, although the counsel for the deceased party refuses to put in evidence the minutes of his former deposition. The object and spirit of the statute (Wagn. Stat. 1372-3, § 1) is to place parties upon an equality, so that one shall not be permitted to testify to transactions cognizant to both, when the other can no longer be heard. But the surviving party should, at his second examination, be interrogated, upon his own side, only upon the points embraced in his former testimony; and if he gave a different version of any of them, his testimony should so far be ruled out. And the burden of showing the agreement between the testimony given at the first and that rendered at the second trial, in order to demonstrate its competency, rests on the party offering himself as a witness.—Coughlin v. Haeussler, Ex'r of Dillon, 126.

EVIDENCE—(*Continued.*)

2. *Evidence — Objections to, etc.*—When objections to evidence are made, the reasons for making them should be distinctly stated, and no other reasons can be urged on error or appeal.— *Id.*

3. *Contract — Written agreement not varied by parol, when.*— Evidence of a parol agreement is not made inadmissible as varying the terms of a written contract, where that portion of the instrument bearing upon the subject-matter of the parol agreement had been purposely erased by the parties.— Letcher v. Letcher, 137.

4. *Evidence — Trials — Leading questions — Discretion of court.*— Leading questions are sometimes permissible in a direct examination. When and under what circumstances they are so, rests in the sound discretion of the court trying the case to determine; and its discretion is not assignable for errors.—King v. Mittalberger, 182.

5. *Evidence — Variance — Parties.*—Suit was brought to recover compensation for services alleged to have been rendered in a former suit instituted by defendant. The record of the former suit showed that the suit had been instituted in the name of defendant, and that her trustee was joined with her. *Held*, that the former suit was virtually the suit of defendant, and that the joinder of her trustee did not make the parties so different as to constitute a variance and exclude the former suit as evidence.— *Id.*

6. *Surveyor — Map of, not sufficient — Competency of as evidence.*— A plat or map which is not an official map of the county surveyor, is valueless as a record. But the surveyor who made it, in testifying as to a locality, may submit it to the jury with the rest of his evidence for what it is worth.—Williamson v. Fischer, 198.

7. *Practice, civil — Evidence — Testimony, objection to.*—Exceptions to testimony, without an assignment at the time of the ground on which they are predicated, will not be afterward regarded by the Supreme Court.— Lohart v. Buchanan, 201.

8. *Witness — Contradiction of, how accomplished.*—Where it is proposed to contradict a witness by proof of different statements made by him at another time, his attention must be called to the time, place and person involved in the supposed contradiction.— *Id.*

9. *Evidence — Witness, contradiction of.*— A witness cannot be impeached by contradicting him in reference to an immaterial fact.—*Id.*

10. *Practice, civil — Evidence, weight of.*—What weight shall be attached to evidence is a matter to be determined exclusively by the jury, or the trial court sitting as a jury.— Allen v. Jones, 205.

11. *Judgment — Appearance of parties.*—The record of a judgment or decree which recites that both parties appeared to the suit by their counsel is *quoad hoc* properly admissible in evidence. It certainly cannot be attacked collaterally.— Miller v. McCoy, 214.

12. Allegata *and* probata — *Consideration — Money — Lands.*— Although the consideration named in a deed sued on is money, evidence is proper showing it to have been in fact lands given in exchange and of the value named.— *Id.*

13. *Practice, civil — Evidence, documentary.*— The rule is that controverted facts, especially when the evidence is contradictory, will be considered in actions triable by jury as correctly found in the trial court. But when docu-

EVIDENCE—(*Continued.*)

ments or records are submitted in evidence their legal effect is a matter of law. —Waddell v. Williams, 216.

14. *Fraud, proof touching.*—Fraudulent acts need not be proved by positive testimony, but there should be a chain of circumstances such as would reasonably satisfy the mind of their commission.—Chandler v. Fleeman, 239.

15. *Evidence — Opposite party — Impeachment.*—When one has made the opposite party his witness he cannot afterwards impeach his credibility.—*Id.*

16. *Attorney and client, communications between—Construction of statute.*—The rule which excludes testimony of professional communications between attorneys and clients is broad enough to embrace a case where the one seeking counsel pays no fee and employs other attorneys in the prosecution of the business, and even where the lawyer consulted is afterwards employed on the other side. The term "client," as used in the statute (Wagn. Stat. 1374, § 8), should be understood in its most enlarged sense, and the prohibition should close the mouths of all who have listened to disclosures looking to professional aid.—Cross v. Riggins, 335.

17. *Practice, criminal — Threats by deceased, the day prior to homicide.*—In an indictment for murder, evidence of threats made by the deceased the day prior to the homicide, and continuing uninterruptedly down to the time of the death, declaring his intention to kill the accused, is competent as a part of the *res gestæ*, and should not be excluded from the jury.—State v. Keene, 357.

18. *Homicide—Character of deceased as desperate, etc., may be shown, when.*—Where a homicide occurs under such circumstances that it is doubtful whether the act was committed maliciously or from a well-grounded apprehension of danger, testimony showing that deceased was turbulent, violent and desperate, is proper, in order to determine whether the accused had reasonable cause to apprehend great personal injury to himself.—*Id.*

19. *Criminal law — Confessions, when competent—Duress.*—The mere fact that a criminal was in charge of an officer at the time is not sufficient to render his confession inadmissible in evidence. But it must further appear that it was induced by the flattery of hope or the torture of fear, or intimidation.—State v. Simon, 370.

20. *Criminal law — Dying declarations, when admissible—Fear of death.*—In order to render a dying declaration admissible, it should clearly appear that the statements offered in evidence were made under well-founded apprehension of immediate or impending dissolution.—*Id.*

21. *Criminal law — Evidence — Dying declaration — Truth of, to be determined by the court.*—The truth of the evidence introduced to show that the declarations were made in view of speedy death, is a matter exclusively for the court to determine.—*Id.*

22. *Deeds — Acknowledgments — Military bounty lands — Copies — Proof of loss, etc.*—A deed conveying military bounty lands in this State, and acknowledged before a notary public of another State, is inadmissible in evidence, unless the evidence shows that such notary was, at the time of the execution of the deed, authorized by the laws of his own State to take such acknowledgment. (Wagn. Stat. 278, §§ 35-6.)

1. And copies of such deeds from the county records are not admissible upon proof—as in ordinary cases—that the original is not within the control

EVIDENCE—(*Continued.*)

of the party wishing to use it; but the proof must show the loss or destruction of the original instrument.

2. Nor are such deeds admissible solely by reason of their ancient date. Mere antiquity is not sufficient to authorize their introduction. They must be otherwise accounted for, or it must be shown that they come from the proper custody.

3. Sections 35 and 36, p. 595, Wagn. Stat., touching record copies of ancient deeds, do not contemplate cases of bounty.—Crispen v. Hannavan, 415.

23. *United States patent—Proof of record.*—A United States patent for military bounty land may be shown in evidence without proof that the same was recorded in the land department, or memorandum of such record. — Callaway v. Fash, 420.

24. *Conveyances — Evidence — Variance.* —The fact that the grantor in a deed is described as John Nichols, and that the instrument is signed by John Nichols, Junior, will not render it inadmissible.—*Id.*

25. *Ejectment—Outstanding title, proof of.*—It is sufficient for defendant in ejectment to show title in another, without establishing his own.—*Id.*

26. *Deeds — Acknowledgment — Copies — Military bounty lands.* — Certified copies of the record of deeds conveying military bounty lands are not competent evidence, under section 36, Wagn. Stat. 595, which applies to the general law of evidence, but not to cases relating to military bounty lands.—Ryder v. Fash, 476.

27. *Lands and land titles — Evidence — Ancient deed.* — A deed properly acknowledged, which has been for more than thirty years in the possession of the party claiming title under it, is properly admitted in evidence as an ancient deed.—*Id.*

28. *Deeds — Military bounty lands — Acknowledgment in another State.*—The acknowledgment of a deed in accordance with the laws of the State where it is made, is sufficient under the military bounty land law.—*Id.*

29. *Evidence — Admissibility of deeds — Agency.*—Where an heir at law undertakes to convey the inherited land, and in one part of the deed describes himself as agent for the heirs of the deceased, but in all other parts of the deed speaks of himself as the granting party, and executes the deed in his own name, the deed should be admitted in evidence as his own deed.—Endsley v. Strock, 508.

30. *Evidence — Cost of work — Experts — Opinions of witnesses.* — A witness can only be allowed to detail facts, and not mere opinions not based upon facts. But in estimating the cost of work, etc., he must give the facts, and then may be allowed to state what his estimate is upon the facts detailed.—Fitzgerald v. Hayward, 516.

31. *Description — Recorded map — Metes and bounds.*— A recorded map is evidence of courses and distances, but must yield to actual measurement and to the actual location of the lines.—Neenan v. Smith, 525.

32. *Sheriff's deed — Recitals—Evidence — Clerical error — Diversity of statement in notices.* — A clerical error in a sheriff's deed, by which it was made to recite that the notice of sale was published in "the *Union*," when in fact it was published in "the *Herald*," is not such a substantial misrecital as will destroy the effect of the deed. If the notice was published the requisite

EVIDENCE—(*Continued.*)

length of time, and in a newspaper in compliance with the law, it is sufficient. And a diversity of statement in two notices of the sale, published respectively in English and German, one stating that the sale would take place during the session of the Circuit Court, and the other that it would take place during the session of the Court of Common Pleas, is not such a mistake as would invalidate the sale. If both were regular as to time and place, they imparted full information to those who desired to bid; and a sale when either court was in session was equally legal. There was no error in substance, and no person could have been misled by the inaccuracy.— Matney v. Graham, 559.

33. *Evidence — Records — Probate Court of Buchanan county.*—The act organizing the Probate Court of Buchanan county (Sess. Acts 1851, p. 515, art. II, § 2) provides that the judge of probate shall make, keep and preserve complete records of all wills, etc., and the proof thereof, all letters testamentary and of administration, etc., and of all judgments and orders which he may make thereon, forming a perfect record of his proceedings. *Held*, where the original will was beyond the power or control of the party desiring to prove it, that the record above mentioned was admissible as evidence of the will and the proofs thereof.— *Id.*

34. *Evidence — Land titles — Will, to be received as evidence, must be shown to affect the land.* — In a suit in ejectment, a will offered to show title must be shown to embrace the land in controversy. Unless this is done, the will is not competent evidence.— Gaines v. Carriker, 564.

35. *Deeds and conveyances — Delivery, rebuttal of — Registry — Possession of the deeds.* — Where a grantor, after executing deeds, handed them to the grantee, saying "Here, my son, are your deeds," evidence is admissible to show the *mala fides* of the transaction, such as the after-possession of the deeds by the grantor and the non-registry of the deeds, the latter especially in the case of deeds of gift.— Phillips v. Phillips, 603.

See ATTACHMENTS, 1; BILLS AND NOTES, 7; CONTRACTS; CONSTABLE, 1; CONVEYANCES, 7; DAMAGES, 9; JUSTICES' COURTS, 2; LAND AND LAND TITLES, 5; LANDLORD AND TENANT, 6; PRACTICE, CIVIL — TRIALS, 6, 15; PRACTICE, SUPREME COURT.

EXCAVATION.

See TRESPASS.

EXECUTION.

1. *Garnishment on execution not a new suit.*— Summons may issue directly against a garnishee on execution, residing in any county in the State, without suing out process as in case of an original suit. Garnishment is one of the modes pointed out by the statute by which the writ is executed. It is not a new suit, but an incident or auxiliary of the judgment, and a means of obtaining satisfaction of the same by reaching the defendant's credits.—Tinsley v. Savage, 141.

2. *Land titles — Sheriffs — Justice's transcript.*— The sale of real estate upon an execution issued upon a justice's transcript filed in the Circuit Court, passes a perfect title.— Waddell v. Williams, 216.

3. *Sheriff's sale — Justice's transcript — Execution — Validity of purchase — Constable's return — Purchase in trust.*— In a suit for land claimed under sale on execution issued from the Circuit Court on a justice's transcript filed therein, *held:*

EXECUTION—(*Continued.*)

1st. That the failure of the record to show affirmatively that the execution from the justice's court was issued to a constable of the township where the defendant resided (Wagn. Stat. 839, § 14), will not invalidate the title held under the sale in a collateral proceeding. For the purpose of any such proceeding the title is valid, and parol evidence therein to show that at the time of the issue of the justice's execution and the constable's return, defendant in the execution lived in another township, is improper.

2d. It is not essential to the validity of the execution issued from the Circuit Court, or the sale under it, that the transcript embrace a copy of the execution by the justice and the *nulla bona* return by the constable, where the sheriff's deed recites the fact of such issue and return.

3d. The sheriff's deed need not show that the justice's execution was issued to a constable of the township where the execution-defendant resided.

4th. The title derived from the sale is not invalidated by the fact that the purchase thereat, in its legal operation, resulted in a trust, where the property has not been charged with the trust by proper proceedings. Such trust must be ascertained and declared in equity before it can attach.—*Id.*

4. *Execution sale — Notice of publication — General judgment — Action for money paid — Ignorantia legis.* —An execution under a general judgment which was based on an order of publication alone is void. But where, with full knowledge of the facts and under a misapprehension only as to the law, one procures the issuance of the execution, purchases the property at sale under the execution, and pays the money to the attorney of the execution creditor, the latter is entitled to recover it from his attorney.—Hendrix, Adm'r, v. Wright, 311.

5. *Sheriff — Constitution — Retroactive laws — Vested rights.* —The act of March 23, 1863 (Sess. Acts 1863, p. 20), authorizing the issue of an execution of *venditioni exponas* upon a levy theretofore duly made, with a clause for further levy after exhausting the property levied on, is not retroactive, nor does it divest any vested right, but it is simply in the nature of a remedy to enforce an existing right.—Porter v. Mariner, 364.

6. *Sheriff — Levy — Deed by successor of the term of office.* —Under the act of 1855, touching executions (R. C. 1855, p. 750, § 6; Wagn. Stat. 613 § 61), a sheriff may, after expiration of his term of office, make a deed to land levied on by his predecessor. And he may do so without any order of court.—*Id.*

7. *Execution — Levy, date of prior to that of execution, etc.* —The dating of a levy made under an execution, before the date of the issue of the execution, will not vitiate it.—*Id.*

8. *Sheriff, deed by — Relates back, etc.* —A sheriff's deed relates back to the time of the sale, as to the defendant in the execution and his privies, and as to strangers purchasing with notice, and vests the title in the execution purchaser from that time.—*Id.*

9. *Judgments — Execution, issue of without leave of court — Vested rights, etc.* —Where a judgment was entered while the law of 1855 was in operation, the issue of an execution thereunder need not be governed by that law, but the Legislature may extend the time thereby allowed for the issue of the execution without leave of court. The act granting such extension is simply a

EXECUTION—(*Continued.*)
regulation for enforcing a judgment, and does not affect any vested right. —Henschall v. Schmidtz, 454.
See ATTACHMENT, 1; CONSTABLE, 1; REVENUE, 7, 8.

EXPERTS.
See EVIDENCE, 30.

F

FAMILY.
See ADMINISTRATION, 7.

FIRE WARDEN.
See JURY, 1.

FORCIBLE ENTRY AND DETAINER.
See DAMAGES, 5; JUSTICES' COURTS, 2; LANDLORD AND TENANT, 1, 2, 3, 8.

FORMER RECOVERY.
See LANDLORD AND TENANT, 5.

FRAUD.
1. *Frauds — Trusts — Agency — Purchase by agent, for himself, of the property which was the subject of his agency. — Resulting trusts.* — A., residing in Missouri, and B., residing in Illinois, acted as agents for C., also residing in Illinois, in the management of lands in Missouri. A. and B., conspiring together and representing the land as worth but $20 per acre, obtained a deed from C. at that price, and soon afterwards sold the land for $50 per acres *Held*, that as A. and B. stood in a confidential relation to C., being his agent. for the sale of the land, it was their duty as such to act alone for his benefit; and in making the purchase themselves, at an under-value, they became trustees by implication, holding the title for C.—Hunter v. Hunter, 445.
2. *Limitations — Frauds — Trusts — Equitable actions concerning trusts growing out of the realty.* — An action to establish a trust growing out of lands, or to recover the proceeds of a re-sale of lands held under a constructive resulting trust, ought to be governed by the same rule, as to length of time necessary to bar, as an action to set aside a fraudulent conveyance and recover possession of land. And such an action is covered by the last clause of section 2, article III, of the limitation act of 1855 (R. C. 1855, 1047, § 2), which includes, in the actions covered by the ten years' limitation, "actions for relief not herein otherwise provided for."—*Id.*
3. *Limitations — Fraud — Discovery.* — In case of fraud, the statute of limitations begins to run only from the discovery of the fraud. If a party is in possession of, or has notice of, the main facts constituting the fraud, the statute will begin to run from that time.—*Id.*
4. *Lands and land titles—Fraud—Estoppel—Vendee can deny his vendor's title.* — A. was in possession of certain land under title from C., when B. entered upon it, falsely claiming that he had a tax-title, while in fact he had none, and the land had been redeemed, which fact of redemption he concealed from A. B. subsequently made a quit-claim deed to A. under such false representations and concealment, and took a deed of trust to secure the consideration thereof; the land was sold to B. under the deed of trust, and he

FRAUD—(*Continued.*)

sued A. for possession. *Held*, that A. had not so admitted B.'s claim as to be estopped from denying it—first, because the claim was a fraudulent one and was not made in good faith; second, because the grantee in a deed holds adversely to the vendor, and may strengthen his title from any other source. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession.—Mattison v. Ausmuss, 551.

See BILLS AND NOTES, 4, 7; CONVEYANCES, 10; EQUITY, 1, 2, 3; EVIDENCE, 14, 35; INFANTS, 2; MORTGAGES AND DEEDS OF TRUST, 12; PARTNERSHIP, 2; TRUSTS AND TRUSTEES.

FRAUDS, STATUTE OF.

1. *Warranty, verbal — Statute of frauds* — The verbal warranty of an auctioneer, where he himself alone was trusted and expressly agreed for himself to warrant the title, is an original undertaking and not within the statute of frauds, and it may therefore be shown in evidence.—Schell v. Stephens, 375.

See LANDLORD AND TENANT, 9.

FRAUDULENT CONVEYANCES.

1. *Equity—Fraudulent conveyance—Vendee, offset by—What not permitted.* —Where a creditor purchases the land of his debtor at sale under execution, and brings suit against the debtor and a third party to set aside as fraudulent a conveyance of the land from the former to the latter, no principle of equity will permit the fraudulent grantee to offset against the value of the property the amount he may have paid for it. The fraud renders the deed absolutely void as to creditors, and plaintiff is entitled to recover the property and its rents, etc., as though no such fraudulent deed ever had been made.—Allen v. Berry, 90.

2. *Fraudulent conveyances — Property purchased by an insolvent with his own money, in the name of another, void as to purchasers.* — If a person who is insolvent or in failing circumstances purchases property with his own money, and has it conveyed by his vendor to a third party, that conveyance is void as to subsequent purchasers of the property from the insolvent. The property continues to be his, and if he conveys it his vendee will acquire a good title. —Henderson v. Dickey, 161.

3. *Fraudulent conveyances — Mortgage of stock in trade, etc.* — A mortgage by A. and B. conveying "the entire stock in the broom-making business lately owned by said A. and B., consisting of all the broom-corn on hand and all the brooms and machinery," showed on its face that the mortgagors were to continue to manufacture the brooms and to sell them, and was therefore fraudulent and void as to creditors and purchasers, under section 1 of the statute concerning fraudulent conveyances.—Lodge v. Samuel's Ex'r, 204.

4. *Fraudulent conveyances — Preference.* — A debtor has the right to prefer one creditor over another, and his acts in that respect cannot be questioned, providing that he does nothing with a fraudulent intent, or which operates to hinder or delay his other creditors.— Ensworth v. King, 477.

G

GARNISHMENT.

1. *Garnishment on execution not a new suit.*—Summons may issue directly against a garnishee on execution, residing in any county in the State, without suing out process as in case of an original suit. Garnishment is one of the modes pointed out by the statute by which the writ is executed. It is not a new suit, but an incident or auxiliary of the judgment, and a means of obtaining satisfaction of the same by reaching the defendant's credits.—Tinsley v. Savage, 141.

2. *Garnishee — Answer of, etc.*—The answer of a garnishee must stand, whether it be a denial or an affirmation of new matter, until evidence is produced conducing to overthrow it.—Holton v. South Pacific R.R. Co., 151.

3. *Practice, civil — Garnishment — New trial — Bill of exceptions.*—In case of a judgment against a garnishee, where no motion for new trial is made and no bill of exceptions appears, except one filed to the refusal of the court to set aside a default against the garnishee and permit him to answer, judgment will be affirmed.—Hovey v. Sauer, 301.

GOOD SAMARITAN HOSPITAL.

See REVENUE, 6.

GUARDIAN AND WARD.

1. *Equity — Guardian and ward — Will — Donation to guardian — Undue influence — Presumption of, how overthrown.*—Any one occupying a fiduciary relation so recently that the influence arises therefrom is presumed still to exist, cannot avail himself of bounty from his late ward, or other persons holding the relation, unless there is clear and distinct evidence that the influence has determined, and that the donor acted in a manner perfectly free, independent and unbiased; and the beneficiary must in all instances furnish this evidence. And the rule holds notwithstanding the fact that such proof is difficult, and perhaps almost impossible, to attain.—Garvin's Adm'r v. Williams, 206.

2. *Guardian and ward — Infants — Sale of lands, petition for — Judgments — Evidence.*—The fact that a petition for the sale of lands belonging to an infant is not sworn to, does not make the judgment had thereon void. At best it would only be cause for reversal.—Castleman v. Relfe, 583.

3. *Guardian and ward — Circuit Court — Jurisdiction — Sale of lands — Evidence.*—In an application to a Circuit Court for the sale of lands of infants the court has jurisdiction, and the presumption is that its orders are based upon sufficient testimony. If the evidence is totally insufficient, this would simply constitute an error in the proceedings of the court rendering it; but the judgment would be valid until reversed, annulled or set aside in the proper manner.—*Id.*

See INFANTS.

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HABEAS CORPUS.
See PRACTICE, CRIMINAL, 10.

HANNIBAL AND ST. JOSEPH RAILROAD.
See RAILROADS, 3, 4.

HEIRS, CONVEYANCE BY.
See CONVEYANCES, 8.

HUSBAND AND WIFE.

1. Where land is held by the wife simply as her own, and in which the husband has marital rights, if she join in the sale, and the proceeds are collected by him in his own name, and used as he uses his other funds — there being no contract or understanding with the wife in regard to them—they become the property of the husband.—Tillman v. Tillman's Estate, 40.

2. *Insurance — Policy of by husband for benefit of wife, may be made payable to second wife.* — At common law, and prior to the statute (Wagn. Stat. 936, § 15), the wife had such an interest in the life of her husband that a policy taken out by him for her benefit would be valid; and where the husband died during the life of his wife it would be enforced. But not so as to her legal representatives where the husband survived her. The only ground upon which the policy could be sustained when issued, was the fact that the wife had a right to look to her husband for support. That object being lost by her death, the husband would not be bound to continue the policy for the benefit of her legal representatives. And he might change the policy for the benefit of a subsequent wife.—Gambs, Public Adm'r, v. Covenant Mutual Life Ins. Co., 44.

3. *Married women, contracts of — Separate estate.* — A married woman possessing a separate estate is treated as a *femme sole* in regard to that estate, and may dispose of it or do whatever is necessary for its protection; and if she becomes discovert she may be sued at law on any contract she may previously have made concerning or binding that estate. — King v. Mittalberger, 182.

4. *Married women* — Jus disponendi. — A married woman will have the uncontrolled disposition of property left to her sole and separate use, notwithstanding the fact that the mode of its disposition is by the terms of the deed made specific, as by a writing signed and witnessed by two witnesses, or by devise. She is not restricted to that mode, but may adopt any other method known to the law, unless affirmatively confined to the one named.—Green v. Sutton, 186.

5. *Wife's estate, how parted with.*—A wife cannot part with her legal estate in lands in Missouri except by deed, in which her husband joins, executed and acknowledged according to the requirements of the statute.—Huff v. Price, 228.

6. *Husband and wife — Husband may sell his marital interest — Sale of land — Part performance — Equitable estoppel.*—A husband may bind himself personally by a contract for the sale of his interest in his wife's lands. And where he stands by and suffers his wife to make a contract for the sale of an estate, and with his knowledge and consent the purchaser enters into the possession under his contract, pays part of the purchase-money, and makes

HUSBAND AND WIFE—(*Continued.*)

valuable and lasting improvements, he thereby adopts his wife's contract as his own, and will be afterwards estopped from suing for possession of the land without restoring to defendant the purchase-money he has paid out, with interest, and compensating him for the value of the improvements made by him on the land.— *Id.*

7. *Equity— Bill to set aside conveyance—Land bought with money of wife— Husband's consent, etc.*—The husband has a right, if he chooses, to give real estate to his wife, although paid for entirely by himself, and his consent that she shall receive the deed to herself will show his intention in that regard. But in the absence of any proof of such intent, if it shall appear that the property is purchased with the money of the wife, whether her sole and separate estate, or simply assets which the husband had the power to appropriate to his own use, the wife should not be divested of it. The husband's consent will be presumed, and even without it the title is properly in the wife.— Smith v. Smith, 262.

8. *Practice, civil—Actions—Parties—Husband and wife—Mechanics' liens.*— An action under the mechanics' lien law is no exception to the law requiring that the husband shall be joined in all actions against the wife. (Wagn. Stat. 1001, § 8.)— Latshaw v. McNees, 381.

9. *Practice, civil— Parties— Husband and wife.*—The statute of 1868 (Wagn. Stat. 1001, § 8), which provides that "when a married woman is a party her husband must be joined with her in all actions except those in which her husband is plaintiff only and the wife defendant only, or the wife plaintiff and the husband defendant," is in conflict with the statute of 1865 (Gen. Stat. 1865, p. 651, § 8), under which a married woman might have been sued alone in respect to her separate property, and she cannot now be sued alone except when the husband sues her.— *Id.*

10. *Practice, civil— Non-joinder— Error, how reached when not apparent on the face of the proceedings— Amendments— Limitation.*— Where suit is improperly brought against a married woman without joining her husband, and judgment is rendered against her alone, and the error does not appear on the face of the proceedings, the error can only be brought to the attention of the court by a proceeding in the nature of a writ of error *coram nobis*. The usual way is by motion supported by affidavit or evidence. There is no statute of limitations against such a motion; the statute of amendments (Wagn. Stat. 1036, § 19) does not cure this error.— *Id.*

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INFANTS.

1. *Chancery, court of— Sale of estate of minors not a nullity.*— Chancery proceedings to sell the estate of minors, although instituted prior to the act of 1861 (Sess. Acts 1860-61, p. 98), were not void in the sense of being a nul-

INFANTS—(*Continued.*)

lity, even if the court went beyond its powers. Chancery courts have always had jurisdiction over the estates of minors. And if they exceed their powers under the law, such excess is not a naked assumption of power, as might be the case if the tribunal had no jurisdiction. Their action in such cases not being a nullity, but, if void, only relatively so, strangers cannot disregard it. —Kearney v. Vaughan, 284.

2. *Partition — Sale — Infants — Gross inadequacy of price, even in absence of fraud, ground for setting aside sale.*— On a suit in partition, some of the parties to which were infants, sale was ordered of a tract of land worth $1,600, and an agent of one of the parties was engaged to be present and prevent a sacrifice of the property. By some accident this agent was prevented from attending, and the land was sold for $50. *Held*, that although no fraud in the purchase appeared, yet the inadequacy of price was so great as to shock the conscience; and, as infants were concerned, it was the duty of the court to set aside the sale.— Mitchell v. Jones, 438.

3. *Infants — Partition — Guardian* ad litem *— Next friend.*— An infant can not bring a suit in partition by a next friend. The guardian, if there be one, must bring the suit; and if there be none, the court in which such suit is to be brought may, in term time, appoint a guardian *ad litem*, who shall have all the authority of a regular guardian in such case.— *Id.*

See Guardian and Ward; Equity, 16.

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INSURANCE, FIRE.

1. *Insurance, fire — Breach of warranty — Description of building — Plats, etc.*— Notwithstanding that the application for an insurance policy and the policy itself described the insured building as composed of brick, whereas, in fact, it was partly of brick and partly frame, the company could not, by reason of this discrepancy, set up the defense of breach of warranty, where the evidence further showed that, at the date of the application and policy, the insured expressed himself to the company's agent as uncertain whether the description was correct, and where the proof showed that the question of its accuracy was left open to be determined by certain plats, which were left with the agent and showed the true character of the building. And it was the proper province of the jury to pass upon all these facts.—Woods, Assignee of Tesson, v. Atlantic Mutual Ins. Co., 112

INSURANCE, LIFE.

1. *Insurance — Policy of by husband for benefit of wife, may be made payable to second wife.*— At common law, and prior to the statute (Wagn. Stat. 936, § 15), the wife had such an interest in the life of her husband that a policy taken out by him for her benefit would be valid; and where the husband died during the life of his wife it would be enforced. But not so as to her legal representatives where the husband survives her. The only ground upon which the policy could be sustained when issued, was the fact that the wife had a right to look to her husband for support. That object being lost by her

INSURANCE, LIFE—(*Continued.*)
death, the husband would not be bound to continue the policy for the benefit of her legal representatives. And he might change the policy for the benefit of a subsequent wife.—Gambs, Adm'r of Holliday, v. Covenant Mutual Life Insurance Co., 44.

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JUDGMENTS.
1. *Practice — Res adjudicata.* — A matter once litigated or adjudicated cannot be reopened in another suit at law or in equity.—Wilson v. Boughton, 17.
2. *Practice — Judgments — Correction of mistakes.* — A judgment cannot be corrected in a court of law after the term at which it was rendered.—*Id.*
3. *Equity—Correction of mistakes in judgments.*—Where a court of law makes a mistake in calculating the amount for which judgment should be given, equity will relieve against the mistake, even at a term subsequent to the entry of the judgment.—*Id.*
4. *Judgment — Confession — Confessor need not be party, when.*—In proceedings by the heirs of A. to reform the entry of a judgment confessed in favor of A., but entered in favor of A. and B., it is not essential that the person confessing shall be made a party.—Turner, Ex'r of Benoist, v. Christy, 145.
5. *Judgment, correction in entry of — Power of not statutory.*—A proceeding to correct the entry of judgment is not governed by the statute in reference to setting aside judgments for irregularity. It is a proceeding outside of the statute, and invokes the inherent power residing in every court of record.—*Id.*
6. *Judgments — Entry—Errors in—Corrections, when may be made.*—Where the clerk of a court fails to enter judgment when rendered, or enters up the wrong judgment, the court may correct the matter and order proper entries to be made at any time. And it may always, at subsequent terms, correct mere forms in its judgments or misprisions of its clerk, or mere clerical errors, so as to conform the record to the truth. But when a court has omitted to make an order or decree which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc;* and in all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry. (Gibson v. Chouteau's Heirs, 45 Mo. 171, affirmed.) Where it was obvious from the record that a judgment by confession was rendered, and that the insertion of the name of one of the parties on the entry was a mere clerical error, the record furnishes all the necessary evidence to amend by.—*Id.*
7. *Judgment — Assignment of, filed with papers, sufficient.*—To render the assignment of a judgment valid it is not necessary either that it be made on or attached to the record of judgments, or that it be attached to the judgment roll. It is sufficient if it be filed with the papers.—Tutt v. Couzins, 152.

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8. *Judgment, roll of — Attachment of papers.*—The provision in the statute (Wagn. Stat. 419-20, §§ 7-9) requiring the papers in a cause to be attached together after the determination of a cause, is simply intended for their preservation.—*Id.*

9. *Mechanics' lien — Judgment not void because contractor not made co-defendant.*—In a mechanics' lien suit, the original contractor ought to be brought before the court as a co-defendant, for the purpose of protecting his own rights and those of the owner. But if he is not so brought before the court at the proper time, the judgment will not for this reason be irregular and void.—Horstkotte v. Menier, 158.

10. *Judgment — Clerical mistake in, how corrected.*—A clerical mistake in the rendition of a judgment on a mechanics' lien may be corrected by the lower court *nunc pro tunc*, on proper application.—*Id.*

11. *Judgment — Jurisdiction must be shown from the whole record.*—If the whole record of a cause taken together does not show that the court had jurisdiction over the defendant, then the judgment would be a nullity. But a court has no right to draw this conclusion from the entry of the judgment.—Howard v. Thornton, 291.

12. *Bond, suit on — Verdict — Judgment — Appeal, etc.*—In a suit upon an official bond, the error of the trial court in rendering judgment upon the verdict of the jury, instead of on the bond, with a further judgment that relator have execution for the damages assessed, is a merely formal one, which may be corrected at any time, and will not authorize a reversal of the cause.—State, to use of Koontz, v. Luce, 361.

13. *Judgment — Amendment of,* nunc pro tunc.—Where a motion for a new trial and the whole case is continued to the next term of court, the judgment may be amended *nunc pro tunc.*—Bruney v. Marcum, 405.

14. *Decrees — Bind parties and privies.*—Judgments and decrees conclusively bind all parties or persons in privity, whether of estate or blood or law, but has no binding power over strangers.—Crispen v. Hannavan, 415.

15. *Judgments—Execution, issue of without leave of court—Vested rights, etc.*—Where a judgment was entered while the law of 1855 was in operation, the issue of an execution thereunder need not be governed by that law, but the Legislature may extend the time thereby allowed for the issue of the execution without leave of court. The act granting such extension is simply a regulation for enforcing a judgment, and does not affect any vested right.—Henschaff v. Schmidtz, 454.

16. *Judgments — Entry of* nunc pro tunc, *after term—Cannot be made, when.*—After the term at which final judgment is rendered, no entry can be made altering the form of the judgment unless the facts appear of record, or on the minutes of the court, or from the papers on file, to authorize such change. Such entries cannot be made from outside evidence or from facts existing alone in the breast of the judge, after the term at which final judgment was rendered.—Saxton v. Smith, 490.

See ADMINISTRATION, 10; ATTACHMENT, 1; BILLS AND NOTES, 6; ERROR, WRIT OF, 2; EVIDENCE, 11; GARNISHMENT, 3; LANDLORD AND TENANT, 8; MECHANICS' LIEN, 4; PRACTICE, CIVIL—TRIALS 15; SALES, JUDICIAL, 4.

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See COURT, CIRCUIT, 4; JUDGMENTS, 11; JUSTICES' COURTS, 1; LAND AND LAND TITLES, 11; SALES, JUDICIAL, 2.

JURY.

1. *Jury service—Fire warden, exemption of from.*—Section 4 of the act of 1845 (Local Laws 1845, p. 15) exempt members of the corporation of fire wardens from jury service, and declares that a certificate of the secretary "certifying to their membership shall be competent evidence of the fact," and further provides that a certificate "shall be granted only to active and faithful members." *Held*, that the exhibition of such certificate is proof only of the mere fact of membership, and none whatever that the bearer is an active and faithful member of the corporation, and will not exempt him from jury duty.—State ex rel. Parsons v. Primm, 87.
2. *Jurors — Jury commissioner — Jury service, liability for — Appeal from jury commissioner.*—The jury commissioner of St. Louis county is constituted a court for passing upon all claims for exemption, and judges of courts have no right to consider the question whether a juror is subject to jury duty or not, only as the decision of the commissioner is appealed from under the statute. (Laws applicable to St. Louis County, p. 210.)—*Id.*
3. *Jury, removal of, from one county to another.*—A court has no right to have a jury carried from one county to another.—Norvell v. Deval, 272.
4. *Jury — Session after adjournment.*—A court has no authority to have a jury in session after the adjournment of the court to a distant day.—*Id.*
5. *Jury —No verdict in case of insanity.*—If, after a jury is sworn, one of them is rendered incompetent by insanity or otherwise, no verdict can be rendered and a new jury must be ordered.— *Id.*
6. *Jury — Verdict, etc.*—The jury must all be in court when the verdict is rendered.— *Id.*
7. *Jury, polling of — Signing of verdict.*— Either party has the right to poll a jury. It makes no difference whether the verdict is signed by all the jurors or only by the foreman.— *Id.*

See PRACTICE, CIVIL — TRIALS, 15; PRACTICE, CRIMINAL, 1, 2.

JUSTICES' COURTS.

1. *Justice of peace—Jurisdiction—Amendment.*—A justice of the peace may permit a plaintiff to amend his statement so as to bring the amount within his jurisdiction.—Burden v. Hornsby, 238.
2. *Practice, civil — Justices' courts — Statement of cause of action—Forcible entry and detainer — Evidence.*—Strictness of averments and technical precision in pleading is not required in magistrates' courts. When there is an allegation of forcible entry the complainant shall not be required to make further proof of the forcible entry than that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained, or unlawfully detained, the same. (Wagn. Stat. 645, § 16.) — McCartney v. Auer, 395.
3. *Justices' courts — Appeal — Affirmance — Appearance.*—An appearance of the appellee in the Circuit Court, on appeal from a justice, for the purpose of asking an affirmance, is not such an appearance as will waive the failure of appellant to give the notice of the appeal required by the statute. (Wagn. Stat. 850, § 21.)—Rowley v. Hinds, 403.

JUSTICES' COURTS—(*Continued.*)

4. *Justices' courts — Appeal — Failure of notice — Affirmance.*—Where an appeal from a justice is not allowed on the same day when the judgment is rendered, the failure of the appellant to notify the other party of the appeal before the second term of the Circuit Court thereafter, is such a failure to prosecute the appeal (Wagn. Stat. 344, § 10) as will warrant an affirmance of the judgment.—*Id.*

5. *Justices' courts — Jurisdiction — Railroads — Contracts of affreightment — Construction of statute.* — Under the existing laws of this State, justices of the peace now have jurisdiction over contracts of affreightment made by railroad companies to the extent of ninety dollars.—Williams v. North Missouri R.R. Co., 433.

6. *Justice of the peace—Appeal—Cause of action, change in.*—On appeal from a justice of the peace, the rectification of a mistake in the name of a party, or the introduction of a new party, does not change the cause of action, and will be permitted.—House v. Duncan, 453.

7. *Justices' courts — Appeal — Practice in Circuit Court — Notice — Affirmance.*—The appearance in the Circuit Court of the appellee, on appeal from a justice's court to obtain an affirmance of the judgment, is not such an appearance as will waive or imply notice, and a continued failure to give notice notwithstanding such appearance is a failure to prosecute the appeal. Purcell v. Hannibal & St. Joseph R.R. Co., 504.

8. *Justices' courts — Cause of action — Statement of, what sufficient.*—In an action before a justice for damages done plaintiff's cow by defendant's dog, a complaint setting forth the fact that "defendant kept a dog that was in the habit of worrying and injuring cattle, and that defendant, knowing its propensity, permitted it to run at large, and that said dog worried and injured the cow of plaintiff, for which he asks damages," etc., is sufficient without the further allegation that defendant "wrongfully or negligently suffered the dog to run at large," etc.

The law disregards formalities in proceedings before justices.—Forbes v. Shellabarger, 8.

9. *Justices' courts — Practice — Statement — Precision not required.* — Precision and conformity to rigid rules cannot be invoked in regard to proceedings before justices of the peace; and where a transcript from a justice stated that plaintiff had filed his affidavit, and gives its substance, and the justice sends up as one of the original papers in the case a statement indorsed "affidavit," it sufficiently appeared that the statement had been filed at the institution of the suit, and it was error to dismiss the case on the ground that no statement had been filed with the justice.—Kruse v. Hagedorn, 576.

See EXECUTION, 2, 3; LANDLORD AND TENANT, 8.

L

LAND AND LAND TITLES.

1. *Limitations — Section 16 of St. Louis township — Action brought under act of March 3d, 1851.*—The commissioners appointed by the County Court of St. Louis county, under the general assembly act of March 3d, 1851, had power to sue in their own names for possession of a tract of land embraced in fractional section sixteen of St. Louis township, although the statute

LAND AND LAND TITLES—(*Continued.*)
gave them no legal right to the land. In such suit these commissioners, although suing in their own names, acted simply as agents of the State, and against the State no limitation ran, under the law as it then stood. And there is nothing to prevent the Legislature from passing a law authorizing agents created for the recovery of these lands from suing in their own names.— Glasgow v. Lindell's Heirs, 60.

2. *Lands and land titles — Common-field lots — Occupancy under act of 1812 — Surveys, etc.*— It is the settled construction of the act of Congress of June 13, 1812, that by its own terms this act vested in each inhabitant of the town of St. Louis the absolute title in fee to the common-field lot which he possessed or cultivated prior to December 20, 1803. There was no condition of survey necessary to vest title. If the surveyor general assumed to survey any of the lots by metes and bounds as they existed in Spanish times, such surveys would be evidence, not to establish but to ascertain the lots as originally defined upon the ground. But in making such surveys he must be governed by the old Spanish monuments.

In case of undefined tracts of land, under acts of Congress confirming claims and requiring surveys, no title passes until the survey is made. But a common-field lot either exists upon the ground by defined limits or it has no existence at all, and cannot be created by survey.— *Id.*

3. *Lands and land titles — Common-field lots — Occupancy prior to December, 1803 — Schools.*— Only such of the field lots in the Grand Prairie common fields of St. Louis, cultivated by the inhabitants of St. Louis prior to the 20th of December, 1803, as might be assigned, not exceeding a certain amount, were reserved for the support of the schools.— *Id.*

4. *Act of 1812 — Cultivation and possession, ownership presumed from.*— In ejectment setting up title to land in St. Louis township common fields, evidence that the land had been "cultivated and possessed" under the act of 1812 would be sufficient without further positive proof that the possessor had "claimed" it. The presumption of ownership would arise without such additional proof.— *Id.*

5. *Lands and land titles — Carondelet, town of, deeds by — Evidence.* — Under the provisions of an act authorizing the corporation of Carondelet to sell and convey certain lots of ground, approved February 13, 1833 (2 Terr. Laws, 393), the town of Carondelet was expressly authorized to convey certain particular lots of ground therein mentioned, and a conveyance executed pursuant to that law is admissible in evidence.— Henderson v. Dickey, 161.

6. *Equity — Trusts — A charitable devise will be carried into effect by a court of equity according to its intent.* — The jurisdiction of courts of equity over charitable devises and bequests is derived from their general authority to carry into execution the trusts of a will or other instrument according to the intention as expressed by the donor; and if the charity cannot be carried out in the exact mode indicated by the donor, or if that mode should become by subsequent circumstances impossible, the general object is not to be defeated if it can in any way be obtained.— Academy of the Visitation v. Clemens, 167.

7. *Equity — Charitable bequests of lands intended to last forever cannot be defeated by the heirs at law of the donor.*—Where lands are vested in a corporation by devise for charitable purposes, and it is contemplated by the donor

LAND AND LAND TITLES—(*Continued.*)

that the charity should last forever, the heirs can never have the lands back again. If it should become impossible to execute the charity as expressed, another charity will be substituted by the court so long as the corporation exists.—*Id.*

8. *Deeds — Life estate — Remainder* — Habendum.— If a deed embrace inconsistent provisions, some indicating a power of absolute disposal, which can only be had by the holder of the fee, and others creating a remainder which supposes a life estate, the words of the *habendum* clause should control, and there can be no remainder.—Green v. Sutton, 186.

9. *Deeds — Conveyance, with power of disposition.*— A conveyance coupled with a distinct and naked power of disposition always carries the fee, unless such conveyance be made by express words to vest an estate for life only. (On this proposition Adams, J., expressed no opinion.)—*Id.*

10. *Lands and land titles—Life estate — Limitation over.*— There cannot be a limitation over, after the death of a tenant for life, to the heirs of one then living. And in construing a deed made to A., with remainder over to the heirs of B., where it was doubtful whether the grantor intended conveying to A. an estate in fee simple or for life, the former intention might be inferred from the chance that B. would perhaps survive A., and so the estate might lapse; and in determining this question, it would be immaterial whether A. held the legal or the equitable estate.—*Id.*

11. *Action compelling party to quiet title—Defense—Suit to quiet title may be brought in Federal court — Construction of statute — Non-resident defendant.*— In proceedings under the statute (Wagn. Stat. 1022, § 53) compelling defendant to show cause why he should not bring suit to try his title, it is a good defense that he has already done so in the United States court. He is not forced to take steps by affidavit, etc., to transfer the cause. The case is not one where the State court has obtained jurisdiction of the subject-matter. The statutory proceeding is not in the first instance for the purpose of settling the title, but preliminary to an action which the adverse claimant may be compelled to bring. And the order of the court does not respect the title, but the institution of the action.

In suit by claimant to adjust his title he may resort to the Federal tribunal, and will not be restricted to the court of the county where the lands are situate, as in State cases.

Such suit to show cause may be brought against a non-resident if proper service can be had upon him in the State.— Deware v. Wyatt, 236.

12. *Sale of lands—Agency—Suit at law for balance — Statute of frauds—Parol evidence.*—Land was conveyed by deed absolute on its face, and for an alleged valuable consideration, but in fact without consideration, with a verbal agreement that the grantee should sell the land as agent for the grantor and account for the proceeds. *Held*, that the agreement, not being in writing, as required by the statute of frauds (Wagn. Stat. 655, § 3) could not be carried out, and could not be shown in evidence for that purpose. But the agreement would raise an implied trust in the grantee to account for the land and its proceeds to the grantor, and proof of the bargain as showing the last named trust would be competent under the statute of frauds. That act contemplates express and not implied trusts. In such case the grantor might sue for the recovery of the balance of proceeds in the hands of the

LAND AND LAND TITLES—(*Continued.*)

grantee, declaring upon the agreement merely as inducement, and the cause would be properly submitted to the jury.—Peacock, Adm'r of Maddox, v. Nelson, 256.

13. *Equity—Bill to set aside conveyance—Land bought with money of wife—Husband's consent, etc.*—The husband has a right, if he chooses, to give real estate to his wife, although paid for entirely by himself, and his consent that she shall receive the deed to herself will show his intention in that regard. But in the absence of any proof of such intent, if it shall appear that the property is purchased with the money of the wife, whether her sole and separate estate, or simply assets which the husband had the power to appropriate to his own use, the wife should not be divested of it. The husband's consent will be presumed, and even without it the title is properly in the wife.—Smith v. Smith, 262.

14. *Lands—Railroad—Platte county—Charter—Title to lands of road, etc.*—Section 8 of the act chartering Platte County Railroad, notwithstanding the language therein employed, did not contemplate the investiture of a technical fee-simple title in that road, of land condemned. Nothing more than an easement passed to the railroad under that act. And the grantor of land, a portion of which had been vested in that road by virtue of statutory condemnation and decree had, prior to the date of the deed, would not be liable to the grantee on his covenant of seizin for the land so appropriated.—Kellogg v. Nealin, 496.

15. *Lands—Railroad—Title to—Easement.*—The occupancy of land, under proceedings for condemnation, by a railroad company, constitutes merely an easement thereon, and not an ownership in fee simple.—*Id.*

16. *Lands, occupancy of by railroads—Encumbrances, covenant against.*—The occupancy of land by a railroad track is such an encumbrance thereon as would render the grantor liable on his covenant against encumbrances. And his liability is not discharged by the fact that the grantee, at the date of the deed, was aware of the existence of the encumbrance.—*Id.*

17. *Partition—Parol agreement—Equitable title—Adverse possession.*—Although a parol partition is good between the parties when accompanied by possession, yet the equitable title only passes, which by adverse possession may ripen into a legal estate; and a party to such agreement has a right to have the parol agreement confirmed by a decree vesting in him whatever title the other party had in the premises.—Huzen v. Barnett, 506.

18. *Lands and land titles—Conveyances—Description—Latent ambiguity—Parol evidence—Recorded map or plats.*—Parol testimony is admissible to explain a latent ambiguity in a deed. And where the owner of land had it laid out in lots fronting on one street, and a map of such division acknowledged and recorded, but, before selling any lots, made a new division of the same land into lots fronting on a different street, but recorded no map of the new division, and afterwards sold some of the lots by numbers only, parol evidence was admissible to show that the lots sold were according to the last map, and not the one on record.—Schreiber v. Osten, 513.

19. *Partition, decree of—Adverse title—Estoppel.*—A decree in partition does not estop the parties to the suit from setting up a new and independent title afterwards acquired; it only affects the title they then had.—Tapley v. McPike, 589.

LAND AND LAND TITLES—(*Continued.*)

20. *Court, County — Order of distribution — Innocent purchaser.* — In a matter of distribution, the judgment of a County Court, while unreversed, will protect an innocent purchaser or a stranger buying property under it. (Castleman v. Relf, *ante*, p. 583.) — *Id.*

See BONDS, TITLE, 1; EJECTMENT; EQUITY, 12, 13; ESTOPPEL, 3; EVIDENCE, 29, 34; LANDLORD AND TENANT, 2; LIMITATIONS, 2, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17; SHERIFFS' SALES, 1, 2, 7.

LANDLORD AND TENANT.

1. *Forcible entry and detainer — Rents and damages — Cross-action of ejectment by defendant in — Forcible entry — Rule of damages in.*—A. having leased certain premises to B., forcibly dispossessed him before the expiration of the lease. B. having sued him for possession in forcible entry and detainer, *held*, that A. could not claim rents or damages by way of offset in that suit, but must submit to the judgment of the court; that is, restore the property and pay the damages and rents allowed by the judgment. He might then bring his action of ejectment, laying his ouster prior to the time he dispossessed B.; and in such suit he would be entitled to recover the premises and damages for their detention from the time of such ouster. He would also be entitled to the rents due him under the lease, and rent after the expiration of the lease up to the time the property was restored to him. But where defendant in the forcible entry suit died before the property was restored, and the judgment was presented for allowance before the Probate Court, all just claims for rents and damages should be allowed.— Robinson v. Walker, 19.

2. *Forcible entry and detainer — Title cannot be settled in.*— It is well settled that in actions of forcible entry and detainer, the title to the property cannot be inquired into.— Lass v. Eisleben, 122.

3. *Administrator may make leases and sue in unlawful detainer — Heirs may join him in suit.*— An administrator, under direction of courts having probate jurisdiction, may make short leases of the real estate belonging to his decedent, and for proper cause may oust the tenant by action of forcible entry and detainer. And *semble*, that in such a suit the administrator and the heirs may be joined as plaintiffs.— *Id.*

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In such a suit the true rule of damages would be the difference in the rent as provided for in the lease and the rental value of the premises. And the rental value would be not what the premises might be worth to the plaintiff, but what they would rent for in the neighborhood.— Hughes v. Hood, 350.

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6. *Landlord and tenant — Attornment by tenant to a stranger void — Right of re-entry and ouster — Evidence.* — Under the statute (Wagn. Stat. 879, §§ 10-11), where a tenant for a term not exceeding two years in possession, without the landlord's consent, delivered the key of the premises to a party other than the landlord, and afterwards accepted the key and continued in possession as tenant of a stranger, the landlord was entitled, after giving ten days' notice, to institute proceedings to regain possession; and under such proceedings the landlord has a right to prove the giving of such notice.— McCartney v. Auer, 395.

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LANDLORD AND TENANT—(*Continued.*)

lessor on his covenant to deliver possession. But where he chooses to sue the wrong-doer for unlawful detainer, and recovers judgment against him for possession and damages for the detention, he cannot afterwards resort to his remedy against the landlord; and in case of such an action the latter may plead the former recovery by the lessee, in bar of the suit.— *Id.*

6. *Landlord and tenant — Attornment by tenant to a stranger void — Right of re-entry and ouster — Evidence.* — Under the statute (Wagn. Stat. 879, §§ 10–11), where a tenant for a term not exceeding two years in possession, without the landlord's consent, delivered the key of the premises to a party other than the landlord, and afterwards accepted the key and continued in possession as tenant of a stranger, the landlord was entitled, after giving ten days' notice, to institute proceedings to regain possession; and under such proceedings the landlord has a right to prove the giving of such notice.— McCartney v. Auer, 395.

7. *Practice, civil — Justices' courts — Statement of cause of action — Forcible entry and detainer — Evidence.* — Strictness of averments and technical precision in pleading is not required in magistrates' courts. When there is an allegation of forcible entry the complainant shall not be required to make further proof of the forcible entry than that he was lawfully possessed of the premises, and that the defendant unlawfully enter into and detained, or unlawfully detained, the same. (Wagn. Stat. 645, § 16.)—*Id.*

8. *Forcible entry and detainer — Amount claimed — Judgment for greater sum.* — In an action commenced before a justice of the peace, under the forcible entry and detainer act, if plaintiff claim a specific sum as embracing the amount of his damages, judgment on appeal to the Circuit Court for a greater sum is error.— Moore v. Dixon, 424.

9. *Landlord and tenant — Statute of frauds — Holding over — Payment of yearly rent.* — After the expiration of a written lease, a tenancy from year to year may be created by a verbal permission to hold over and receipt of yearly rent.— Hammon v. Douglass, 434.

10. *Landlord and tenant — Holding over — Act of 1869, effect of.* — Section 13 of the landlord and tenant act, as amended by that of 1869 (Sess. Acts 1869, p. 68), by which tenancies not in writing are made to be from month to month, will operate upon an implied tenancy at will, where the tenant holds over under a written lease, although the lease was made prior to the passage of the act.—*Id.*

LANDMARK.

See PRACTICE, CIVIL—ACTIONS, 1.

LEASE.

See CONVEYANCES, 7; LANDLORD AND TENANT.

LEGISLATURE.

See CONTRACTS, 2; COURT, PROBATE, 1; EXECUTION, 9; PROBATE COURT OF BOONE COUNTY, 2, 4, 5, 6; MANDAMUS, 1, 2; RAILROADS, 4; TRUSTS AND TRUSTEES, 6.

LIBEL.

1. *Libel, action for — What words libellous — Justification, how established.* — The following publication was held to be actionable as a libel: "I found an

LIBEL—(*Continued.*)

imp of the devil in the shape of Jim Price sitting upon the mayor's seat," etc. * * * "And now, sir, that imp of the devil and cowardly snail, that shrinks back into his shell at the sight of the slightest shadow, had the bravery to issue an execution against me," etc. In suit for libel founded on such publication, defendant may, in justification, show mean and disgraceful acts that would answer to the proper appreciation of the terms applied to plaintiff.—Price v. Whitely, 439.

2. *Libel — Express damages need not be proved, when.* — In an action for libel no express damages need be proved, unless charged as specially arising from the profession or occupation of plaintiff.—*Id.*

LICENSE.

See DRAM-SHOPS, 1.

LIEN.

1. *Lien — Judgments — Attachments — Priority — Stay of execution — Real and personal property.* — The lien of an attachment on lands, after judgment against the defendant on the plea in abatement, takes effect from the date of the levy of the attachment, and has priority over a junior judgment; and a stay of execution, under judgment on an attachment, does not have the effect of removing or postponing the lien as to lands. The lien is created by the levy of the attachment and fixed by the judgment. In cases of personal property the principle is different. There the lien arises out of the execution, and after levy the property is in the custody of the officer, and other parties are precluded from taking or intermeddling with it. But if the plaintiff sees fit to direct the officer to hold up the judgment and not proceed to satisfy the writ, he cannot continue to hold the lien.—Ensworth v. King, 477.

See RAILROADS, 5.

LIEN, MECHANICS'.

See MECHANICS' LIEN.

LIEN, STATE, ON RAILROADS.

See RAILROADS, 1, 2.

LIMITATIONS.

1. *Limitations — Section 16 of St. Louis township — Action brought under act of March 3d, 1851.*—The commissioners appointed by the County Court of St. Louis county, under the general assembly act of March 3d, 1851, had power to recover possession of a tract of land embraced in fractional section sixteen of St. Louis township, notwithstanding the fact that defendant had been in the actual possession of the premises sued for, more than ten years prior to the commencement of the action. In such suit these commissioners, although suing in their own names, act simply as agents of the State, and against the State no limitation runs, under the law as it then stood. And there is nothing to prevent the Legislature from passing a law authorizing agents created for the recovery of these lands from suing in their own names. —Glasgow v. Lindell, 60.

2. *Ejectment — Patent — Statute of limitations.* — In actions of ejectment the statute of limitations does not begin to run till the patent issues. (Gibson v. Chouteau, 13 Wall. 93.)—Gibson v. Chouteau, 85.

3. *Limitations — Execution sale — Trustee, possession of, when adverse.* — In suit by the purchaser of land at an execution sale, whereby it is sought to

LIMITATIONS—(*Continued.*)

make a third party, who had previously purchased the land of the execution-defendant, a trustee thereof against his will, his possession must be treated as adverse to that of his vendor, from the time possession is taken under the purchase sought to be avoided.—Bobb v. Woodward, 95.

4. *Limitations — Construction of statute.*— The operation of section 10 of the limitation act (Wagn. Stat. 918) is confined to personal actions.—*Id.*

5. *Limitations — Public schools — Doctrine of* nullum tempus *not applicable.* — An adverse, open and hostile possession for more than ten years before suit brought, is a good defense against a title thereto vesting in the public schools. The doctrine of *nullum tempus* does not apply to any of the subdivisions of the State, such as counties, cities, or other municipal corporations, or to any corporations, private or public. And the act of 1865, excluding lands given to public, pious or charitable use, from the operation of the act of limitations (see Wagn. Stat. 917), has no application to actions commenced nor to cases where the right of entry accrued before the section was enacted.—School Directors of St. Charles v. Goerges, 194.

6. *Limitation — Public schools — Doctrine of* nullum tempus *applies.* — Ten years' adverse possession is no bar to title vesting in the public schools. The act of 1865, withdrawing lands dedicated to public or charitable use from the operation of the statute (Wagn. Stat. 917, § 7), is not modified or controlled by section 32 of the same act (p. 921), confining the limitation statute to cases where the right of action accrued since its passage. The former provision in effect repeals the latter.—*Id.* Per BLISS, Judge, dissenting.

7. *Limitations, statute of — Plea of bar by five years' limitation not a good plea of bar by ten.* — A plea of the statute of limitations which only sets up a bar by lapse of five years is not a good plea of a bar by ten years.—Hunter v. Hunter, 445.

8. *Frauds — Trusts — Agency — Purchase by agent, for himself, of the property which was the subject of his agency. — Resulting trusts.* — A., residing in Missouri, and B., residing in Illinois, acted as agents for C., also residing in Illinois, in the management of lands in Missouri. A. and B., conspiring together and representing the land as worth but $20 per acre, obtained a deed from C. at that price, and soon afterwards sold the land for $50 per acre. *Held*, that as A. and B. stood in a confidential relation to C., being his agents for the sale of the land, it was their duty as such to act alone for his benefit; and in making the purchase themselves, at an under-value, they became trustees by implication, holding the title for C.—*Id.*

9. *Limitations — Fraud — Discovery.* — In case of fraud, the statute of limitations begins to run only from the discovery of the fraud. If a party is in possession of, or has notice of, the main facts constituting the fraud, the statute will begin to run from that time.—*Id.*

10. *Limitations — Adverse possession — Possession of part, with claim to the whole.* — Ordinarily, the possession of one who does not hold the true title can extend only to the land in actual occupancy. The owner, who holds constructive possession of all lands not actually occupied by others, cannot be disseized by a mere claim; there must be something more. In addition to the actual occupancy of a part, the open, notorious and continuous possession as owner, there must be a claim to the whole by the same right under which the part actually occupied is held, and such claim must be *bona fide* and evi-

LIMITATIONS—(*Continued.*)

denced by some paper or proceedings or relation that makes the claimant the apparent owner of the whole.—Crispen v. Hannavan, 536.

11. *Limitations — Adverse possession under claim of title—Paper giving color of title, owner must have actual or constructive notice of.*—Where a paper is relied upon as giving color of title, not only must the entry and occupation be open and notorious, etc., but the true owner must have actual or constructive notice of the paper under which claimant enters, and thus be advised not only of the actual possession, which is so open as to be known of all men, but also of its constructive extent and boundary, which can only be known by the paper.—*Id.*

12. *Limitations — Claim of whole, with possession of part, under color of title — Mixed possession.* — In cases of mixed possession, where both claimants actually occupy parts, under adverse claims to the whole, the true title will prevail against the one merely colorable, and the adverse claimant will be confined to the portion actually occupied.—*Id.*

13. *Administrator's sale of real estate, illegal, will yet give color of title.*— Where an administrator made a sale of real estate which was illegal, yet if all the parties thereto supposed that the sale and deed conveyed the title, such sale and deed gave color of title.—*Id.*

14. *Limitations — Color of title* — Bona fides. — The element of good faith is essential to all papers, proceedings or relations under which color of title is claimed. While the law will refuse to protect mere tricksters or gamblers in lands, who institute sham proceedings or cause to be executed sham conveyances, in order to extend their possession by pretended color of title, it will, on the other hand, protect those who honestly purchase and enter into actual possession of the improvements like other *bona fide* purchasers, or the constructive possession of the premises so purchased, according to the boundaries contained in the instrument under which they enter — having by a proper registration given the world and the true owner notice of their claim.—*Id.*

15. *Limitations — Land and land titles — Privity — Adverse possession.*— Those who hold possession of lands independently of previous holders, their several possessions having no connection, cannot so tack their possession as to avail themselves of that which has gone before. There must be privity of grant or descent, or some judicial or other proceedings which shall connect the possessions so that the latter shall apparently hold by right of the former. But not even a writing is necessary if it appear that the holding is continuous and under the first entry; and this doctrine applies not only to actual but constructive possession under color of title. Such possession tacks to that of previous holders, if there has been a colorable transfer.—*Id.*

16. *Limitations — Adverse possession must be continuous — How broken.*— Living off from the premises, or a failure to cultivate them for a few years for any or every reason, will not necessarily constitute a break in the adverse possession; but an actual abandonment of the premises will so break the possession of him who has occupied, that the constructive possession of the true owner will again attach and save his right of entry.—*Id.*

17. *Limitations — What statute governs — How determined.* — The limitation act is not in terms based upon the title of the occupant, but the laches of the true owner. The legal effect is to give the title to the disseizor, and in availing himself of his right he may trace it to and base it upon any statutory

LIMITATIONS—(*Continued.*)

period in which such owner was dispossessed; and if it appear that he, or those of whose possession he is availing himself, have held for a longer period than necessary, it will not disprove his claim.—*Id.*

18. *Limitations, statute of—When it begins to run—Incapacity, period of, excluded.*—The cause of action arises as soon as the party has a right to apply to the proper tribunal for address; but when there is a temporary incapacity to sue, growing out of some particular provision of a statute, the time of such disability should be excluded from the computation.—Tapley v. McPike, 589.

19. *Limitations, statute of—Administrator—Heirs and distributees—Adverse title.*—When the administrator purchases or acquires title to property of an estate, and afterwards, with the knowledge of the heirs, notoriously asserts title in himself and claims adversely to the estate, he may avail himself of the statute of limitations against the heirs, and in the same manner against the distributees, from the date of final settlement and order of distribution.—*Id.*

20. *Limitations, statute of—Wills—Court, County—Court, Circuit—When it begins to run.*—The law allows five years wherein to contest a will in the Circuit Court, and until that time has passed, the rights under the will are not finally settled, though it is probated in the County Court; and until after that time the statute of limitations does not begin to run against the heirs.—*Id.*

See MECHANICS' LIEN, 3.

M

MALICIOUS PROSECUTION.

See PRACTICE, CIVIL—ACTIONS, 1, 2, 4, 5.

MANDAMUS.

1. *Auditor, State—Claim of public printer.—Superintendent public schools—Report of house committee on*—Mandamus, *etc.*—In *mandamus* by the public printer against the State auditor for a balance claimed to be due from the State for printing one of the reports of the superintendent of public schools, respondent's return showed that the house of representatives had refused to authorize payment of the amount claimed until a committee had investigated the work and made their report thereon; and that said committee had reported commending the auditing of the account, but that the report had never been acted upon and approved by the house; and further, that by law payment of the amount claimed was to be made from a contingent fund which had been exhausted.

Held, that *mandamus* would not lie to compel the auditing of the claim.

1. It was within the discretion of the house to control its contingent fund, and any order that it might make in reference thereto was binding upon the State officers, although the order took the shape of a resolution and not of an act of Legislature. 2. Although the committee's report had been made, this fact would not authorize payment, since the report contained only a recommendation which still remained to be acted upon.

Held, further, that it would be useless to award a writ compelling the auditor to issue a certificate of indebtedness. The only object of section 32,

MANDAMUS—(*Continued.*)

p. 1337, Wagn. Stat., was to bring the claim audited to the attention of the Legislature, and that object was accomplished by the report of the committee.—State ex rel. Wilcox v. Draper, State Auditor, 24.

2. Mandamus — *United States constitution — Pacific Railroad — State bonds, payment of — Action of Legislature touching — Supreme Court, powers of.* —The Pacific Railroad State bonds, issued under the act to expedite the construction of the Pacific Railroad and the Hannibal & St. Joseph Railroad, approved February 22, 1851, being payable on their face in gold and silver, can be met only by payment of the sum called for in gold and silver coin, and not by payment of the amount in legal-tender currency. The legal-tender act cannot affect this obligation. But where the Legislature has determined to pay the bonds in legal-tender currency, the Supreme Court has no power to interfere; and *mandamus* to compel the fund commissioners to pay said bonds in gold and silver coin will not lie.—State ex rel. Seeligman v. Hays et al., Fund Commissioners, 34.

3. Mandamus — *County Court — Assessments — Specific judgment.* — The County Court cannot be compelled by *mandamus* to give a specific judgment. Where it has jurisdiction of a case it might be compelled to hear and determine it. To hear and determine applications for relief from or alteration of tax assessments, is the exercise of judicial and not ministerial power. The County Court must exercise its own judgment on such applications, and no other court can require it to decide in a particular way.—Miltenberger v. St. Louis County Court, 172.

4. Mandamus — *Registrars, posse to protect — Remedy will not lie.* — *Mandamus* will not lie against the judges of a County Court to compel them to audit for payment the claims of a sheriff's *posse* employed, under the act of 1868 (Wagn. Stat. 1157, § 37), to protect the board of registration in the performance of their duties, before the claims have been reduced to judgment.

Mandamus is an extraordinary writ, and will issue only when the applicant has no other specific remedy.—Mansfield v. Fuller, 338.

See COURT, CIRCUIT, 1, 2, 3.

MAP.

See EVIDENCE, 31.

MECHANICS' LIEN.

1. *Mechanics' lien — Judgment not void because contractor not made co-defendant.*—In a mechanics' lien suit, the original contractor ought to be brought before the court as a co-defendant, for the purpose of protecting his own rights and those of the owner. But if he is not so brought before the court at the proper time, the judgment will not for this reason be irregular and void.—Horstkotte v. Menier, 158.

2. *Judgment — Clerical mistakes in, how corrected.*—A clerical mistake in the rendition of a judgment on a mechanics' lien may be corrected by the lower court *nunc pro tunc*, on proper application.—*Id.*

3. *Mechanics' lien — Petition — Amendment — Ninety day limitation.* — An amended petition correcting the original description in a suit on a mechanic's lien is merely a continuance of the original action, and where that was brought within ninety days after filing the lien, plaintiff is not barred by the lien limitation law.—Mann v. Schroer, 306.

MECHANICS' LIEN—(*Continued.*)

4. *Judgment* nunc pro tunc — *Motion for* — *Notice of, etc.*—Where a clerk, in entering up judgment on a mechanic's lien, omitted to make a special judgment, the entry of a special judgment correcting the mistake *nunc pro tunc*, without notice to defendant, is not such an error as would render the judgment void or could be taken advantage of in a collateral proceeding. But where the case is directly brought up by writ of error, the failure of plaintiff to notify defendant of his motion to correct the judgment will render it proper to reverse and remand the cause, with leave to plaintiff to renew his motion.— *Id.*

5. *Practice, civil—Actions—Parties—Husband and wife—Mechanics' liens.*—An action under the mechanics' lien law is no exception to the law requiring that the husband shall be joined in all actions against the wife. (Wagn. Stat. 1001, § 8.)—Latshaw v. McNees, 381.

MISJOINDER.

See PRACTICE, CIVIL — PLEADING, 4; PRACTICE, CIVIL — TRIALS, 5.

MISSOURI STATE LOTTERY.

See CONTRACTS, 1, 2.

MISTAKE.

See AMENDMENT; EVIDENCE, 32; JEOFAILS; MORTGAGES AND DEEDS OF TRUST, 13.

MORTGAGES AND DEEDS OF TRUST.

1. *Deeds of trust — Sale under, nine months after death of owner — Construction of statute.* — The statute forbidding the sale of property under a deed of trust within nine months from the death of the owner (Wagn. Stat. 94, § 7) refers only to deeds of trust executed by the decedent, and not such as may have been executed by some prior owner on the same property.—Lass v. Sternberg, 124.

2. *Deeds of trust — Trustee cannot purchase at sale — Is entitled to be reimbursed, when.* — A trustee cannot buy for his own benefit at the trust sale, and his purchase at such sale will inure in equity to the use of the beneficiaries. He has, however, the right to be reimbursed to the full amount of what he has expended for the property. When the beneficiaries do this they are entitled to the benefit of the purchase.—*Id.*

3. *Fraudulent conveyances — Mortgage of stock in trade, etc.* — A mortgage by A. and B. conveying "the entire stock in the broom-making business lately owned by said A. and B., consisting of all the broom-corn on hand and all the brooms and machinery," showed on its face that the mortgagors were to continue to manufacture the brooms and to sell them, and was therefore fraudulent and void as to creditors and purchasers, under section 1 of the statute concerning fraudulent conveyances.—Lodge v. Samuel's Ex'r, 204.

4. *Trustee — Powers, delegation of.* — A trustee or mortgagee cannot act through an agent in the sale of the trust property, unless the deed expressly authorizes him to delegate his powers.—Howard v. Thornton, 291.

5. *Mortgage — Outstanding title.* — A mortgage constitutes a good outstanding title.— *Id.*

6. *Mortgages and deeds of trust—Mortgage with power of sale — Purchase by mortgagee at his own sale — Equity of redemption.* — The principle is well established that when a power of sale is contained in a mortgage, and

a sale made by virtue of such power, and the mortgagee becomes the purchaser, the equity of redemption still subsists and attaches to the property in favor of the mortgagor; and if at such sale the mortgagee acquires the title through the agency of a third person, the title will not be in anywise altered, but the right of the mortgagor will remain the same.—McNees v. Swaney, 388.

7. *Mortgages and deeds of trust — Conditional sale — Agreement as to time of sale — Equity of redemption.*— Where A., being indebted to B., made a mortgage with power of sale to B. to secure the debt, and at maturity A. was unable to pay, and on account of extraneous circumstances it was considered by both that the matter would be more secure if the mortgaged property was sold and the title vested in B.; and it was thereupon agreed that B., the mortgagee under the power, should sell the premises, and that C. should buy them in, and immediately convey to B., and that A. should have one year in which to pay the debt, and again obtain title to the property, and meanwhile should remain in possession, pay the taxes and have the use of the property; *held*, that the sale was not intended to and did not destroy A.'s equity of redemption. The purchase by C. was, in effect, a purchase by B., and B. therefore being a purchaser at his own sale, the law gave A. the right to redeem, and the agreement did not in any way impair the respective rights of the parties. Such a transaction had none of the elements of a conditional sale. B. did not stand in the position of a person holding the absolute title and agreeing to convey upon certain conditions. He promised the naked legal title, while the equity was in A.—*Id.*

8. *Mortgages and deeds of trust — Equity of redemption — Estoppel—Silence of party claiming interest.*— Where a party claiming an interest in land lies by for a great number of years and sees it enhanced in value and improved by the labor and expenditures of others, the courts will not listen favorably to his demands; and where the person claiming the interest was a mortgagee of the property, and had acquired the interest by a purchase at his own sale, and there is not such want of diligence in the mortgagor as would work a forfeiture by lapse of time, and the mortgagor has not apprehended that he is in danger of losing his property and has been lulled into security by the representations of the mortgagee, the equity of redemption still continues, and the sale does not vest the absolute title in the mortgagee.—*Id.*

9. *Mortgages — Verbal agreement to release — Strict proof required.*— A verbal agreement to release a mortgage, to be sustained, should be established beyond reasonable doubt. Nothing should be left to conjecture, and little to probabilities; and where the evidence on such a point is conflicting, the Supreme Court will not interfere with the judgment of the court below.—Stevenson v. Adams, 475.

10. *Mortgage, validity of — Assent of mortgagee* — Where an instrument is executed in favor of a party for his benefit, he will be presumed to assent thereto until he manifests his dissent, after being duly notified.—Ensworth v. King, 477.

11. *Mortgage—Personal property—Sale of mortgaged property by mortgagor—Rights of parties—Trover.*—The vendee of a mortgagor of mortgaged personal property has only the rights of the mortgagor. The mortgagee in possession is not a naked depositary, but has possession coupled wtih an

MORTGAGES AND DEEDS OF TRUST—(*Continued.*)

interest, and is damaged by an unlawful conversion of the property to the extent of that interest; and he can recover for such conversion against the mortgagor, or the mortgagor's vendee.—McCandless v. Moore, 511.

12. *Deeds of trust — Declarations of grantor—Conspiracy.*—To establish fraud on the part of the grantor in a deed of trust, his subsequent acts and declarations, if not too remote, may be shown. But they cannot be used against the beneficiary without first proving a fraudulent conspiracy between them to defraud the creditors of the grantor.—Exchange Bank v. Russell, 531.

13. *Deeds of trust — Mistakes in — What will be corrected by a court of equity.* — Mistakes in deeds of trust, such as making the debt due the trustee instead of the beneficiary, and describing a bond, *e. g.*, secured by the deed as bearing even date with the deed, instead of being dated a few days prior thereto, are such as a court of equity will correct.—*Id.*

See ADMINISTRATION, 3; TRUSTS AND TRUSTEES; TRUSTEES' SALES.

N

NEGLIGENCE.

See DAMAGES, 1, 2, 4, 7, 8, 9.

NEW TRIAL.

See PRACTICE, CIVIL—NEW TRIAL.

NOTICE.

1. *Notices, legal — English in German paper.* — When legal notices are to be published in a newspaper, an English paper is always intended unless expressed to be otherwise. In the absence of such direction an English advertisement inserted in a German newspaper is bad.—Graham v. King, 22.

See BILLS AND NOTES, 1; EVIDENCE, 32; EXECUTION, 4; JUSTICES' COURTS, 4, 7; LANDLORD AND TENANT, 6.

O

OFFICERS.

1. *Courts, judge of* de facto *—Judge of—Unlawful courts, acts of.*—Although a private individual without authority assumes the office of judge of a court which has a legal existence, yet its acts will not for that reason be void. But where there is no law authorizing such court to be held, and the judge assumes to create a court and preside over it, the tribunal so created and all its proceedings will be absolutely void.—State ex rel. Att'y-Gen. v. County Court of Boone County, 317.

2. *Office without an incumbent, vacant.*— Under the act of April 1, 1872, the Probate Court of Boone county being begun June 1, 1872, but the election of its judge being postponed till the general election in the following November, there existed in the meantime a vacancy in the office of judge of that court which might be filled by appointment from the governor. An existing office without an incumbent is vacant within the meaning of the constitution, and can be filled by the governor by appointment, unless an election or some other mode is plainly indicated.— *Id.*

OFFICERS—(*Continued.*)

3. *Courts, judicial — Abolition, etc.— Semble,* that the abolition or alteration of a judicial circuit will not abolish the office of the circuit judge.— State ex rel. Vail v. Draper, 353.

4. *Courts — New circuits, acts creating — Judge — Commission — Salary —* Mandamus.— When the number used in designating a judicial circuit is also used in the commission issued to the judge, although the boundaries of his circuit are not designated, he is thereby constituted the judge of the territory which elected him. And the passage of an act of the Legislature constituting the same territory a new circuit denominated by a different number, and the appointment of another judge to preside over the circuit so designated, will not have the effect of vacating his office or invalidating his commission. And the judge originally commissioned will be entitled to *mandamus* against the State auditor in case of his refusal to issue a warrant for the proper salary, notwithstanding such legislation and appointment.— *Id.*

5. *Officers* de facto — *Validity of acts.*— The acts of one who is an officer *de facto*, although his title may be bad, are valid so far as concerns the public or the rights of third persons who have an interest in the things done; and where one acts as a *de facto* judge under a law which invests him with authority, although it is unconstitutional, he is not an intruder, and his acts done under color of office must be taken to be valid and binding.— State v. Douglass, 593.

See COMMISSIONER, COUNTY, 1; CONSTABLE, 1; MANDAMUS, 1; PRACTICE, CRIMINAL, 5; REGISTRATION, 1; SHERIFF.

OFFSET.

See BILLS AND NOTES, 2.

P

PACIFIC RAILROAD.

See RAILROADS, 3, 4.

PARTITION.

See INFANTS, 2, 3; LAND AND LAND TITLES, 16, 18.

PARTNERSHIP.

1. *Partnership— Firm assets used to pay individual debts—Government taxes.* —One partner has no right, without the consent of his copartners, to turn over goods of the firm to a third party in payment of an individual debt; but where, pursuant to such an arrangement, the grantee had received the goods and paid the government tax, the remaining partners cannot recover back the goods without reimbursing him for the amount so paid.— Flanagan v. Alexander, 50.

2. *Practice, civil — Actions — Partnership — Judgment — Chancery practice.* —Under the present code, where a partnership has been settled by a judgment, a bill for review according to the old chancery practice will not be entertained. Nor can such bill be allowed as being in the nature of an application to set aside the former adjustment on the ground of fraud, unless the fraud be specifically charged and pointed out, and be of such a nature as to have deceived the other party and the court, and such as could not have been exposed at the time.

PARTNERSHIP—(*Continued.*)

Where the bill contains allegations of fraud, mixed with other matters merely showing error in the settlement, and was treated by the parties and the trial court as a bill of review, it may be stricken out on demurrer.—Martin v. Lutkewitte, 58.

3. *Partnership — Share may be recovered in action at law, when and when not.*— One partner cannot recover from another in an action at law a balance owing on the firm account, unless plaintiff has pleaded and proved a settlement showing such balance, or an agreement admitting the correctness of the claim. An unsettled partnership balance should be reached by bill in equity praying an account. And where plaintiff kept all the accounts, the petition should contain an exhibit of the partnership transactions. But *semble*, that in case of a regular settlement by account and judgment, an action at law might be entertained to recover a partner's share of a few cash items which had been omitted from the account, and the payment of which would close up everything, without reopening the settlement.— Scott, Adm'r, v. Caruth. 120.

See PRACTICE, CIVIL — PLEADING, 2, 3.

PATENT.

See EVIDENCE, 2, 3; LIMITATIONS, 2.

PRACTICE, CIVIL.

1. *Practice, civil — Change of venue — Transcripts — Duties of clerks — Trial upon original papers.* — When a change of venue is taken, it is the duty of the clerk of the court from which the case is taken to send to the court to which it is removed a full transcript of the record proper, together with the original papers not forming a part of it. He must keep on file the original pleadings and transmit copies thereof. But if he sends the originals instead of copies, a trial can be had upon them.— Gilstrap v. Felts, 428.
2. *Rule of court — Valid only when consistent with the statute.*— A rule of court which is contrary to law will not legalize any action under it, but when it affirms the statute it is valid.— Purcell v. Hann. & St. Jo. R.R. Co., 504.

See BILLS AND NOTES, 6; JURY.

PRACTICE, CIVIL — ACTIONS.

1. *Action — Malicious prosecution — Landmark.*— A suit brought against defendant for removing plaintiff's landmark, is not itself rendered actionable as a malicious prosecution by reason of the fact that the landmark was wrongly located, the evidence showing that it had been placed there by the proper officer.— Merkle v. Otteusmeyer, 49.
2. *Action for malicious prosecution — Malice — Want of probable cause.*—An action for malicious prosecution cannot lie without proof of malice and want of probable cause.— *Id.*
3. *Practice, civil — Actions — Partnership — Judgment — Chancery practice.* —Under the present code, where a partnership has been settled by a judgment, a bill for review according to the old chancery practice will not be entertained. Nor can such bill be allowed as being in the nature of an application to set aside the former adjustment on the ground of fraud, unless the fraud be specifically charged and pointed out, and be of such a nature as to have deceived the other party and the court, and such as could not have been exposed at the time.

PRACTICE, CIVIL—ACTIONS—(*Continued.*)

Where the bill contains allegations of fraud, mixed with other matters merely showing error in the settlement, and was treated by the parties and the trial court as a bill of review, it may be stricken out on demurrer.—Martin v. Lutkewitte, 58.

4. *Actions for malicious prosecution — Advice of counsel — Communications with — Statements.*— In an action for malicious prosecution, defendant, in order to shield himself on the ground that he obtained the advice of counsel learned in the law, must show in evidence that he stated to counsel all the facts bearing on the guilt or innocence of defendant in that prosecution, which he knew or by reasonable diligence could have found out. (Hill v. Palm, 38 Mo. 13.)— Sappington v. Watson, 83.

5. *Malicious prosecution — Discharge of accused — Malice — Probable cause.* —To support an action for malicious prosecution, it must appear affirmatively that the prosecution was instituted willfully, falsely and maliciously, and without probable cause.

The discharge of the accused by the examining magistrate, or the ignoring of the indictment by the grand jury, are evidence going to show the want of probable cause. And from this fact, also, malice might be inferred.— *Id.*

6. *Partnership — Share may be recovered in action at law, when and when not.*— One partner cannot recover from another in an action at law a balance owing on the firm account, unless plaintiff has pleaded and proved a settlement showing such balance, or an agreement admitting the correctness of the claim. An unsettled partnership balance should be reached by bill in equity praying an account. And where plaintiff kept all the accounts, the petition should contain an exhibit of the partnership transactions. But *semble*, that in case of a regular settlement by account and judgment, an action at law might be entertained to recover a partner's share of a few cash items which had been omitted from the account, and the payment of which would close up everything, without reopening the settlement.—Scott, Adm'r, v. Caruth, 120.

7. *Action compelling party to quiet title—Defense — Suit to quiet title may be brought in Federal court — Construction of statute — Non-resident defendant.*— In proceedings under the statute (Wagn. Stat. 1022, § 53), compelling defendant to show cause why he should not bring suit to try his title, it is a good defense that he has already done so in the United States court. He is not forced to take steps by affidavit, etc., to transfer the cause. The case is not one where the State court has obtained jurisdiction of the subject-matter. The statutory proceeding is not in the first instance for the purpose of settling the title, but preliminary to an action which the adverse claimant may be compelled to bring. And the order of the court does not respect the title, but the institution of the action.

In suit by claimant to adjust his title he may resort to the Federal tribunal, and will not be restricted to the court of the county where the lands are situate, as in State cases.

Such suit to show cause may be brought against a non-resident if proper service can be had upon him in the State.—Deware v. Wyatt, 236.

8. *Action — Breach of warranty — Cause of action.*— In an action for breach of warranty, where the petition sets out a representation by defendant on which plaintiff relied, and which induced him to make the purchase, it states a good cause of action.— Karney v. James, 316.

PRACTICE, CIVIL—ACTIONS—(*Continued.*)

9. *Action at law converted into an equitable proceeding by answer — Instructions, improper.*—Where an action of law is converted into an equitable proceeding by the answer, it is improper for the trial court to give declarations of law; and it is not error in the court below, on the trial of such action, to refuse instructions, and error cannot be assigned here for such refusal.—Freeman v. Wilkinson, 554.

10. Quantum meruit *for work and labor—Action on — Recoupment — Remote damages.*— In an action for work and labor done, only such damages as naturally result from a breach of the contract can be considered by the court in the way of recoupment; and where the account was for building a fence, defendant could not set up damages suffered by reason of stock breaking through the fence. Such damages were too remote, and could not be set up.—Turner v. Gibbs, 556.

See BONDS, TITLE, 1; EJECTMENT; LIMITATIONS, 8; PRACTICE, CIVIL—PARTIES, 2.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil — Supreme Court — Distribution of funds — Cause reversed and remanded — What issues to be retried.* — A. claimed title to the first of a series of trust notes. On trial the court found him entitled to the note, but not to priority in payment, and ordered payment of the note to be made *pro rata.* From the order of distribution A. took his appeal to the Supreme Court, which declared him entitled to priority of payment, and reversed and remanded the cause, but left the finding below as to his title to the note undisturbed. *Held,* that the Circuit Court could not proceed to retry the case upon its merits, but could only enter up judgment of distribution according to the principles enunciated by the Supreme Court.—Hurck v. Erskine, 116.

2. *Practice, civil — Appeal — Parties — Injunction bond — Sureties.*— The sureties on an injunction bond are not parties to the judgment in the original suit and have no right to appeal therefrom. If a proceeding be had upon the bond to assess damages against them, they become parties in interest and may appeal from the judgment; but until this occurs they have no such interest as authorizes them to carry on the original suit by appeal or otherwise.—St. Louis Zinc Co. v. Hesselmeyer, 180.

3. *Practice, civil — New trial — Error.* —Error will not lie for granting a new trial.—Burden v. Hornsby, 238.

4. *Practice, civil — Verdict — Instructions — Appeal.*—When, on appeal, it appears that instructions were given and a verdict was rendered without any evidence on which to base either, the cause will be reversed and remanded.—Dedo v. White, 241.

5. *Practice, civil — Evidence — Verdict — Appeal.* — Where there is evidence to support a verdict in a law case, the Supreme Court will not disturb it.—Peacock, Adm'r of Maddox, v. Nelson, 256.

6. *Practice, civil — Appeal — Supreme Court will not review a case which turns only on weight of evidence.* — In a law case, where, on the trial in the court below, no exceptions are taken and no instructions asked or given, and the case turns merely on weight of evidence, there is nothing for the Supreme Court to review, and judgment will be affirmed.—Twiss v. Hopkins, 398.

7. *Practice, civil — Appeal — Demurrers and motions which have been complied with, will not be considered on appeal.* — When the ruling of the court below

PRACTICE, CIVIL—APPEAL—(*Continued.*)

on a demurrer or other matter, which might have been final, has been conformed to by those against whom it was had, and the case has proceeded to a new or final trial, such ruling will not be reviewed by the Supreme Court.—Gilstrap v. Felts, 428.

8. *Practice, civil — Appeal — Points must be saved.*— Counsel desiring to have their cases reviewed on appeal should save their points in the trial court.—Durel v. Masterson, 487.

See ERROR, WRIT OF, 1; EVIDENCE, 1, 2, 7; JUDGMENT, 12; JUSTICES' COURTS, 3, 4, 6, 7; LANDLORD AND TENANT, 8; PRACTICE, SUPREME COURT; REVENUE, 1, 3, 4.

PRACTICE, CIVIL—NEW TRIALS.

1. *New trial, motion for — Instructions — Surprise.* — It is no ground for a new trial that appellant was surprised by the giving or refusal of instructions. —State, to use, etc., v. Schar, 393.

See JUDGMENT, 13; PRACTICE, CIVIL—APPEALS, 5; PRACTICE, CIVIL—PLEADING, 13.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil — Defect of parties, how taken advantage of.*— Defect of parties must be taken advantage of by demurrer or answer, and cannot be reached by instruction.—Horstkotte v. Menier, 158.

2. *Practice, civil — Actions — Parties — Husband and wife—Mechanics' liens.* — An action under the mechanics' lien law is no exception to the law requiring that the husband shall be joined in all actions against the wife. (Wagn. Stat. 1001, § 8.) — Leatshaw v. McNees, 381.

3. *Practice, civil — Parties—Husband and wife.*—The statute of 1868 (Wagn. Stat. 1001, § 8), which provides that "when a married woman is a party her husband must be joined with her in all actions except those in which her husband is plaintiff only and the wife defendant only, or the wife plaintiff and the husband defendant," is in conflict with the statute of 1865 (Gen. Stat. 1865, p. 651, § 8), under which a married woman might have stood alone in respect to her separate property, and she cannot now be sued alone except when the husband sues her.— *Id.*

4. *Practice, civil — Non-joinder — Error, how reached when not apparent on the face of the proceedings — Amendments — Limitation.*— Where suit is improperly brought against a married woman without joining her husband, and judgment is rendered against her alone, and the error does not appear on the face of the proceedings, the error can only be brought to the attention of the court by a proceeding in the nature of a writ of error *coram nobis.* The usual way is by motion supported by affidavit or evidence. There is no statute of limitations against such a motion; the statute of amendments (Wagn. Stat. 1036, § 19) does not cure this error.—*Id.*

See EVIDENCE, 5; INFANTS, 3; PRACTICE, CIVIL—APPEAL, 2.

PRACTICE, CIVIL—PLEADING.

1. *Forcible entry and detainer — Rents and damages — Cross-action of ejectment by defendant in — Forcible entry — Rule of damages in.*— A. having leased certain premises to B. forcibly dispossessed him before the expiration of the lease. B., having sued him for possession in forcible entry and detainer, *held*, that A. could not claim rents or damages by way of offset in that suit,

PRACTICE, CIVIL—PLEADING—(*Continued.*)

but must submit to the judgment of the court; that is, restore the property and pay the damages and rents allowed by the judgment. He might then bring his action of ejectment, laying his ouster prior to the time he dispossessed B.; and in such suit he would be entitled to recover the premises and damages for their detention from the time of such ouster. He would also be entitled to the rents due him under the lease, and rent after the expiration of the lease up to the time the property was restored to him. But where defendant in the forcible entry suit died before the property was restored, and the judgment was presented for allowance before the Probate Court, all just claims for rents and damages should be allowed. — Robinson v. Walker, 19.

2. *Practice, civil — Pleading — Amendment — Copartnership, allegation of— Waiver.— Semble*, that plaintiffs were properly allowed to amend their petition by substituting the allegation that they were a copartnership, for the previous averment that they constituted a corporation; and *held*, that where a defendant voluntarily answers such amended petition he thereby waives his objection to such amendment.—Ward v. Price, 38.

3. *Practice, civil — Pleadings — Demurrer — Partnership.*— A petition which treats defendant as a partner and prays for equitable relief, but sets out a contract which shows that no partnership existed, is demurrable.—Mulholland v. Rapp, 42.

4. *Practice, civil — Pleadings — Demurrer — Misjoinder.*—The statute authorizing demurrer for improper joinder of causes of action does not apply to the manner of the joinder — *i. e.*, to the improper commingling in one count of matters that might be properly united in a petition by different counts— but to the substantial error of uniting, whether in one or different counts, matters that cannot be united at all.—*Id.*

5. *Practice, civil — Actions — Partnership—Judgment—Chancery practice.*— Under the present code, where a partnership has been settled by a judgment, a bill for review according to the old chancery practice will not be entertained. Nor can such bill be allowed as being in the nature of an application to set aside the former adjustment on the ground of fraud, unless the fraud be specifically charged and pointed out, and be of such a nature as to have deceived the other party and the court, and such as could not have been exposed at the time.

Where the bill contains allegations of fraud, mixed with other matters merely showing error in the settlement, and was treated by the parties and the trial court as a bill of review, it may be stricken out on demurrer.—Martin v. Lutkewitte, 58.

6. *Practice, civil* — Indebitatus assumpsit — *Motion in arrest, when proper.*— A petition which sets forth that defendant owes plaintiff a given sum for work done and cash lent, is informal and defective; but where defendants answer over, without demurrer or motion, tendering an issue of fact on the allegations, and the case proceeds to trial and verdict, it is too late afterwards to move in arrest on the ground that the petition showed no cause of action. Such motion should be entertained only in case of substantial omissions, and not in case of those which are merely informal. The latter are supplied by intendment, and will be presumed after verdict to be proved.—Saulsbury v. Alexander, 142.

PRACTICE, CIVIL—PLEADING—(*Continued.*)

7. *Practice, civil—Defect of parties, how taken advantage of.*—Defect of parties must be taken advantage of by demurrer or answer, and cannot be reached by instruction.—Horstkotte v. Menier, 158.

8. *Equity — Decree may be for any relief consistent with the allegations of the pleading.* — Under our statutes the court in an equity case may give any relief consistent with the allegations in the pleading, without regard to what is asked.—Henderson v. Dickey, 161.

9. *Practice, civil — Pleading — Equity — Ejectment — Mingling of equitable and legal causes of action in the same count improper — Such causes may be embodied in the same petition.*—It is improper to mingle a cause of action which is purely equitable with one that is strictly legal in the same count in a petition, and proceed to try them together before a chancellor. But it does not therefore follow that in all cases a party must first get his decree for title and then bring a separate and independent action in ejectment to obtain possession. A plaintiff may unite in the same petition several causes of action, whether they be legal or equitable or both, if they arise out of the same transaction and are connected with the same subject of action. But when causes of action are thus united they must be separately stated, with the relief sought in each cause of action, in such manner that they may be intelligibly distinguished, for they require separate trials and separate judgments. Their joinder in the same count would be fatally defective. (Wagn. Stat. 1012, § 3; Peyton v. Rose, 41 Mo. 257, cited and explained.)—*Id.*

10. *Practice, civil — Pleadings — Counts, misjoinder of.*—Defendant, by pleading over, waives his objection to the improper joinder of counts.—Williamson v. Fischer, 198.

11. *Practice, civil—Motion to strike out—Final judgment.*—The action of the Circuit Court in sustaining a motion to strike out plaintiff's petition, is not a final judgment from which a writ of error lies.—Pearce v. McClanahan, 267.

12. *Practice, civil — Pleading — Notes — Suit brought on as upon account — Judgment must be at next term.*—In an action to recover the amount named in certain certificates of indebtedness, where the petition, instead of declaring directly upon the certificates as notes, sets forth a cause of action in account for work and labor done and performed, and referred to the certificates merely as evidence and as exhibits, plaintiff would have no right — answer having been filed — to take judgment at the return term.—Cosgrove v. Tebo & Neosho R.R. Co., 270.

13. *Practice, civil — Appeal — Demurrers and motions which have been complied with, will not be considered on appeal.*— When the ruling of the court below on a demurrer or other matter, which might have been final, has been conformed to by those against whom it was had, and the case has proceeded to a new or final trial, such ruling will not be reviewed by the Supreme Court. — Gilstrap v. Felts, 428.

14. *Practice, civil — Pleading—Interlocutory judgment — Motion in arrest—Motion to set aside.* — After an interlocutory judgment by default against a defendant, he can only be allowed to answer after a motion to set aside such judgment has been sustained; and a motion in arrest and for a new trial, made after a trial for the assessment of damages, if sustained, does not have the effect of allowing the defendant to file an answer.—*Id.*

PRACTICE, CIVIL—PLEADING—(*Continued.*)

15. *Practice, civil — Pleading — Amendments — Continuance — Judgment.*— The filing of an amended petition or answer does not of itself entitle the opposite party to a continuance. In order to entitle such party to a continuance, not only should the court be satisfied that he could not be ready, and that his inability arises from the amendments, but it must also appear that he has a meritorious defense to the claim shown by the new matter as well as to the original pleading.— Calhoun v. Crawford, 458.

16. *Practice, civil — Pleading — Rules of court contradicting or exceeding statute should not be enforced.* —A rule of court which contradicts or exceeds the statute should not be enforced.— *Id.*

17. *Practice, civil — Pleading — Denial of assault and battery — Allegations of petition, not waived by plea of justification — Consistency.*— In an action for assault and battery, a positive denial of the trespass is not waived by a subsequent plea of justification in the same answer. Three defenses, amounting in substance to the pleas of "not guilty," "*son assault demesne*," and *molliter manus imposuit*, are consistent both at common law and under the statutes of this State.— Rhine v. Montgomery, 566.

See GARNISHMENT, 1; JUSTICES' COURTS, 8, 9; LIMITATION, 7, 8; MECHANICS' LIEN, 3; PRACTICE, CIVIL — ACTIONS, 8, 9, 10; PRACTICE, CIVIL — PARTIES, 2, 3, 4; TRESPASS, 3.

PRACTICE, CIVIL — TRIALS.

1. *Practice, civil — Instructions, etc.*— An instruction which assumes all the facts and leaves nothing for the jury is bad.— Glasgow v. Lindell's Heirs, 60.

2. *Practice, civil — Instruction given after argument, effect of.*— The giving of an instruction after the close of the argument before the jury, although irregular, is no ground for the reversal of a cause where the giving of the instruction could work no harm.— Cluskey v. City of St. Louis, 89.

3. *Practice, civil — Instructions, giving of, no ground for reversal, when.*— The giving of an instruction which was outside the case as made by the pleadings, is no ground for reversal where no prejudice was thereby worked to the complaining party.— Rowell v. City of St. Louis, 92.

4. *Practice, civil — Evidence — Jury — Instruction.*— Where plaintiff makes out a case upon which he can go to the jury, the court should not by instruction declare that upon the evidence he cannot recover.— Woods, Assignee of Tesson, v. Atlantic Mutual Ins. Co., 112.

5. *Practice, civil — Pleading — Improper joinder — Instruction.*— The objection that parties are improperly joined cannot be taken advantage of by instruction.— Lass v. Eisleben, 122.

6. *Practice, civil — Evidence — Instruction.*— Where there is evidence tending to prove the issues presented, it is error in the court to withdraw the case from the jury.— Mathews v. St. Louis Grain Elevator Co., 149.

7. *Practice, civil — Defect of parties, how taken advantage of.*—Defect of parties must be taken advantage of by demurrer or answer, and cannot be reached by instruction.— Horstkotte v. Menier, 158.

8. *Practice, civil — Pleading — Evidence — Instruction — Jury.*— Where there is evidence to support a count, it should not be taken from the jury.— Williamson v. Fischer, 195.

PRACTICE, CIVIL—TRIALS—(*Continued.*)

9. *Jury, removal of, from one county to another.*—A court has no right to have a jury carried from one county to another.—Norvell v. Deval, 272.

10. *Jury—Session after adjournment.*—A court has no authority to have a jury in session after the adjournment of the court to a distant day.—*Id.*

11. *Jury—No verdict in case of insanity.*—If, after a jury is sworn, one of them is rendered incompetent by insanity or otherwise, no verdict can be rendered and a new jury must be ordered.—*Id.*

12. *Jury—Verdict, etc.*—The jury must all be in court when the verdict is rendered.—*Id.*

13. *Jury, polling of—Signing of verdict.*—Either party has the right to poll a jury. It makes no difference whether the verdict is signed by all the jurors or only by the foreman.—*Id.*

14. *Practice, civil—Additional instruction.*—If the law has already been correctly laid down in an abstract form for one party to a cause, but the other, in order to prevent misconception, asks to have it applied to the facts as he claims them to be, by an additional appropriate instruction, it should be granted.—Devitt v. Pacific R.R. Co., 302.

15. *Practice, civil—Jury, waiver of.*—An entry of judgment which shows that the parties "appeared and submitted the case for trial to the court" sufficiently indicates that trial by jury was waived.—Bruner v. Marcum, 405.

16. *Instructions—Statement of facts in, etc.*—Where instructions taken as a whole present the facts properly to the jury, they should be given.—Callaway v. Fash, 420.

17. *Practice, civil—Trials—Instructions, erroneous, cannot be cured by others.*—An instruction in itself erroneous cannot be cured by another. One that gives only part of a case may be supplied by another, but there should be no contradiction. Contradiction tends to confuse, not enlighten, the jury. An ambiguous or general term in an instruction may be explained by another, and a partial view may sometimes be supplied, but the whole should be consistent and harmonious.—Goetz v. Hannibal & St. Joseph R.R. Co., 472.

18. *Practice, civil—Trials—Instructions covering the whole case must meet points on both sides.*—Instructions which cover the whole case ought to be so framed as to meet the points raised by the evidence and pleadings on both sides. A party, therefore, who asks an instruction on the whole case must not frame it so as to exclude from the consideration of the jury the points raised by the evidence of his adversary.—Fitzgerald v. Hayward, 516.

19. *Practice, civil—References—Discretionary with court—Construction of statute.*—The whole subject of references is a matter of discretion. The court is not bound in any case to refer. The statute (Wagn. Stat. 1040-41, §§ 12, 17, 18) is not mandatory but directory.—*Id.*

20. *Practice, civil—Trials—Evidence, preponderance of, determined by jury—Instructions should cover the whole case.*—It is the province of the jury to determine on which side the preponderance of evidence attaches, but courts by their instructions should cover the whole case and take in all the testimony.—Ellis v. McPike, 574.

See EVIDENCE, 8, 9, 10, 11, 12; PRACTICE, CIVIL—ACTIONS, 9.

PRACTICE, CRIMINAL.

1. *Practice, criminal — Juror — Expression of opinion as to guilt or innocence of accused — Verdict set aside, when.* — Where, at the impaneling of the jury in a criminal cause, none of them disclosed the fact that they had expressed an opinion as to the guilt or innocence of the accused, but it was afterwards proved that one of them had previously declared his belief that the defendant was guilty, and had stated that he ought to be punished, the verdict should be set aside.—State v. Wyatt, 309.

2. *Practice, criminal — Jury — Instructions as to grade of crime.* — Before a jury can convict of a certain degree of crime, they should be instructed as to what it takes to constitute the elements of that degree.—*Id.*

3. *Practice, criminal — Threats by deceased, the day prior to homicide.* — In an indictment for murder, evidence of threats made by the deceased the day prior to the homicide, and continuing uninterruptedly down to the time of the death, declaring his intention to kill the accused, is competent as a part of the *res gestæ*, and should not be excluded from the jury. — State v. Keene, 357.

4. *Homicide — Character of deceased as desperate, etc., may be shown, when.* — Where a homicide occurs under such circumstances that it is doubtful whether the act was committed maliciously or from a well-grounded apprehension of danger, testimony showing that deceased was turbulent, violent and desperate, is proper, in order to determine whether the accused had reasonable cause to apprehend great personal injury to himself.—*Id.*

5. *Practice, criminal — Indictment — Officer — Scienter, etc.* — An indictment against an officer, under the statute (Wagn. Stat. 487, § 16), should charge that the acts complained of were done not only willfully, but knowingly and corruptly.—State of Missouri v. Hein, 362.

6. *Criminal law — Indictment — Venue.* —The statement of venue in the margin of an indictment is a sufficient allegation of venue for all the facts stated in the body of the indictment.—State of Missouri v. Simon, 370.

7. *Criminal law — Confessions, when competent — Duress.* — The mere fact that a criminal was in charge of an officer at the time is not sufficient to render his confession inadmissible in evidence. But it must further appear that it was induced by the flattery of hope or the torture of fear, or intimidation.—*Id.*

8. *Criminal law — Dying declarations, when admissible — Fear of death.* — In order to render a dying declaration admissible, it should clearly appear that the statements offered in evidence were made under well-founded apprehension of immediate or impending dissolution.—*Id.*

9. *Criminal law — Evidence — Dying declaration — Truth of, to be determined by the court.* — The truth of the evidence introduced to show that the declarations were made in view of speedy death, is a matter exclusively for the court to determine.—*Id.*

10. *Criminal law — Indictment — Recognizance* — Habeas corpus. — After indictment, a justice of a County Court other than the county where the indictment is pending has no power to take a recognizance for the appearance of a prisoner, unless he is brought before such justice by writ of *habeas corpus*.— State v. Ferguson, 470.

PRACTICE, CRIMINAL—(*Continued.*)

11. *Practice, criminal — Indictment, quashing of* — An indictment which wholly fails to aver any specific facts for which defendant can be called to answer, is properly quashed.—State of Missouri v. Albin, 419.

12. *Recognizance* — Scire facias — *Variance.*— Where, a recognizance having been entered into in open court for appearance at the next term, *scire facias* thereon alleged that said recognizance was entered into before Judge A., of that court, such allegation was held no variance. The writ of *scire facias* was a part of the original case, and its issue opened the whole record to see what the recognizance was.—State of Missouri v. Ferguson, 470.

13. *Indictment — Bawdy house—Proof, etc.*—An indictment for leasing premises for the purpose of being used to keep a bawdy house cannot be sustained without proof that the defendant knew of the purpose to which the house was to be put.—State of Missouri v. Leach, 535.

See DRAM-SHOP, 1.

PRACTICE, SUPREME COURT.

1. *Practice, civil — Evidence — Dispute touching, etc.* — Where the facts are all admitted upon the record, the Supreme Court must pass upon their legal effect. It is only when they are disputed, and when there is evidence tending to sustain the claim of each party, that the losing one is concluded by the finding of the trial court.—Gambs, Adm'r of Holliday, v. Covenant Mutual Life Ins. Co., 44.

2. *State Supreme Court, on case reversed from U. S. Supreme Court, may reopen record, how.*— It seems that when a case is reversed in the Supreme Court of the United States on one issue, and remanded to the State court for further proceedings in accordance therewith, the latter court may reopen the record for the correction of other errors appearing thereon, of which the State courts have sole jurisdiction.—Gibson v. Chouteau, 85.

3. *Practice, civil — Verdict — Instructions, etc.* — *Semble*, that the Supreme Court will not reverse a cause on the ground that an instruction was improper, where the verdict was not thereby affected.—Hedicker v. Ganzhorn, 154.

4. *Practice, civil — Appeal — Instructions — Exceptions.*—Instructions will not be reviewed when no exceptions are taken.—Walsh v. Allen, 181.

5. *Practice, civil — Instructions, exceptions to.*— Instructions not excepted to in the lower court will not be reviewed in the Supreme Court.—Shaw v. Porter, 281.

6. *Practice, Supreme Court — Ten per cent. damages.* — When an appeal is destitute of merit, ten per cent. damages may be awarded. — Shackley v. North Missouri Coal Co., 410.

7. *Practice, civil — Instructions — Exceptions, etc.*—Where appellant saves no exceptions to the action of the lower court in giving instructions, such action will not be reviewed on appeal.—Van Cleve v. Gilstrap, 412.

8. *Practice, civil — Verdict — Evidence — Appeal.* — In a civil law case the Supreme Court will not interfere with the verdict of the jury on the ground that the same is against the weight of evidence.—Harwood v. Larramore, 414.

9. *Practice, civil — Supreme Court — Appeal, failure to prosecute.* — *Damages.* — Where appellant fails to prosecute his appeal as required by law, and no reason is shown for the delay, the judgment will, on motion of respondent—

PRACTICE, SUPREME COURT—(*Continued.*)

a perfect copy of the record being presented by him—be affirmed, with ten per cent. damages.—St. Joseph Manufacturing Co. v. Pershing, 427.

10. *Practice, Supreme Court—Damages.*—Where an appeal is clearly made for the sole purpose of gaining time the judgment of the court below will be affirmed, with ten per cent. damages.—Colhoun v. Crawford, 458.

11. *Practice—Supreme Court—Appeals—Evidence.*—In cases at law, where there is any evidence to sustain the verdict, the Supreme Court will not disturb it.—Turner v. Gibbs, 556.

See DAMAGES, 9; EVIDENCE, 7; PRACTICE, CIVIL—APPEAL; PRACTICE, CIVIL—TRIALS, 3.

PRIVITY.

See ESTOPPEL, 1; JUDGMENT, 14; LIMITATIONS, 15, 16.

PROBATE COURT OF BOONE COUNTY.

1. *Courts, judge of,* de facto—*Judge of—Unlawful courts, acts of*—Although a private individual without authority assumes the office of judge of a court which has a legal existence, yet its acts will not for that reason be void. But where there is no law authorizing such court to be held, and the judge assumes to create a court and preside over it, the tribunal so created and all its proceedings will be absolutely void.—State of Missouri ex rel. Henderson v. County Court of Boone County, 317.

2. *Probate Courts—Special acts creating, not unconstitutional.*—The act of April 1, 1872, creating the Probate Court of Boone county, is not obnoxious to section 27, article IV, of the State constitution, as being in the nature of a special enactment.

1. The question whether or not "provision can be made by general law" for such a court, contemplated by that section, is, under a proper construction of the law, one for the Legislature to determine for itself.

2. Aside from that section, the Legislature had the right to establish a Probate Court under the general power granted by section 1, article VI, of the State constitution, authorizing it "to establish inferior tribunals from time to time, as they might be needed." Under this latter section the Legislature is to judge of the time when the exigency demanding such a court may arise.—*Id.*

3. *Office without an incumbent, vacant.*—Under the act of April 1, 1872, the Probate Court of Boone county being begun June 1, 1872, but the election of its judge being postponed till the general election in the following November, there existed in the meantime a vacancy in the office of judge of that court which might be filled by appointment from the governor. An existing office without an incumbent is vacant within the meaning of the constitution, and can be filled by the governor by appointment, unless an election or some other mode is plainly indicated.—*Id.*

4. *Special legislation—Remedy.*—Section 27, article IV, of the State constitution, prohibiting special legislation, is directory, binding upon the conscience of legislators; but if disobeyed, the courts cannot furnish the remedy.—*Id.* Per BLISS, Judge.

5. *Boone Probate Court—Law creating, unconstitutional—Supreme Court bound to so declare.*—The act creating the Boone County Probate Court is in conflict with section 27, article IV, of the State constitution.

PROBATE COURT OF BOONE COUNTY—(*Continued.*)

1. The act creating the St. Louis Court of Criminal Correction was upheld as being found to be in point of fact absolutely necessary in a large city like St. Louis (State v. Ebert, 40 Mo. 196), and the law authorizing cities, towns and villages to organize for school purposes, with special privileges, was held valid on the ground that the act was as general as was consistent with its scope and design, and was coextensive with the State. (State *ex rel.* Dome v. Wilcox, 45 Mo. 458.) That case decided that, had the act applied to certain specified towns and corporations, it would have been unconstitutional. But there was no necessity for the act creating the Probate Court of Boone county. There is no reason why courts for the administration of probate business should not be created under a general and uniform law. And a decision sustaining this special law would nullify the State constitution, and blot out one of its most important provisions.

2. It is not within the sole discretion of the Legislature to determine whether these special statutes are demanded. But it becomes the Supreme Court to decide, on a case presented, whether, under the existing facts, the laws are in conformity to the constitution. To leave the matter entirely within the discretion of the Legislature would be to render the prohibition against special legislation practically a dead letter. — *Id.* Per WAGNER, Judge, dissenting.

6. *Boone Probate Court, act touching—Section 1, article VI, of the constitution does not authorize.*— Section 1, article VI, of the State constitution does not authorize the passage of the act creating the Probate Court of Boone county. The effect of that section is simply to invest the Legislature with power to establish inferior courts, but their establishment must be in conformity to the constitutional requirement; *i. e.*, they must be authorized by a general law and be uniform throughout the State.—*Id.*

PROBATE COURT OF BUCHANAN COUNTY.

See EVIDENCE, 33.

PUBLIC PRINTER.

1. *Auditor, State—Claim of public printer—Superintendent public schools—Report of house committee on*—Mandamus, *etc.*—In *mandamus* by the public printer against the State auditor for a balance claimed to be due from the State for printing one of the reports of the superintendent of public schools, respondent's return showed that the house of representatives had refused to authorize payment of the amount claimed until a committee had investigated the work and made their report thereon; and that said committee had reported commending the auditing of the account, but that the report had never been acted upon and approved by the house; and further, that by law payment of the amount claimed was to be made from a contingent fund which had been exhausted. *Held*, that *mandamus* would not lie to compel the auditing of the claim.

1. It was within the discretion of the house to control its contingent fund, and any order that it might make in reference thereto was binding upon the State officers, although the order took the shape of a resolution and not of an act of Legislature. 2. Although the committee's report had been made, this fact would not authorize payment, since the report contained only a recommendation which still remained to be acted upon.

PUBLIC PRINTER—(*Continued.*)

Held, further, that it would be useless to award a writ compelling the auditor to issue a certificate of indebtedness. The only object of section 32, p. 1337, Wagn. Stat., was to bring the claim audited to the attention of the Legislature, and that object was accomplished by the report of the committee.—State ex rel. Wilcox v. Draper, 24.

PUBLIC SCHOOLS, SUPERINTENDENT OF.

See PUBLIC PRINTER, 1.

Q

QUIETING TITLES.

See LAND AND LAND TITLES, 11.

R

RAILROADS.

1. *Railroads — Iron Mountain R.R. — State lien — Sale of after-acquired lands under.*— The lien of the State upon the Iron Mountain Railroad lands, created by the act of 1851 (Sess. Acts 1851, p. 266 *et seq.*), embraced land acquired by the road after the creation of the lien, and foreclosure and sale of the road under said act would carry title to such land.—Whitehead v. Vineyard, 30.
2. *Iron Mountain R.R., sale of—What lands appurtenances to road.*—The sale of the Iron Mountain Railroad and its appurtenances, under the act of February 22, 1851 (Sess. Acts 1851, p. 268, § 11), and acts pursuant thereto, embraced railroad land, although outside of the railroad and not necessary to its use. (See Sess. Acts 1865–6, p. 107, § 6.)—*Id.*
3. Mandamus — *United States constitution — Pacific Railroad — State bonds, payment of — Action of Legislature touching — Supreme Court, powers of.*— The Pacific Railroad State bonds, issued under the act to expedite the construction of the Pacific Railroad and the Hannibal & St. Joseph Railroad, approved February 22, 1851, being payable on their face in gold and silver, can be met only by payment of the sum called for in gold and silver coin, and not by payment of the amonnt in legal-tender currency. The legal-tender act cannot affect this obligation. But where the Legislature has determined to pay the bonds in legal-tender currency, the Supreme Court has no power to interfere; and *mandamus* to compel the fund commissioners to pay said bonds in gold and silver coin will not lie. — State ex rel. Seeligman v. Hays, 34.
4. *Legislature, power of over appropriations — Supreme Court — Superintending control of.*— It was competent for the Legislature to modify or repeal the law appropriating the money for the payment of these bonds, and its action is not liable to superintendence or control by the judiciary.

   The State may say in what manner its debt shall be paid, or that it shall not be paid. And its action may amount to a breach of faith; but there is no power to correct it.—*Id.*
5. *Agency — County Court — Subscription to railroads — Money not paid over, etc.*— A County Court levied a tax for the amount of its subscription to a railroad company, and appointed an agent to receive the money collected,

RAILROADS—(*Continued.*)

and to pay it over "when ordered by the court." *Held*, that the railroad company had no specific or other lien on money collected and in the hands of the agent, but not ordered to be paid over. The money could be recalled from the agent at any time before payment to the company. And for refusal to restore the money on call, the agent became liable to his principal.—Henry County v. Allen, 231.

6. *Railroads — Lands, deeds of, to — Speculation — Railroad lands.* — It was the intention of the Legislature, as shown by the various acts creating and governing the Pacific Railroad Company (see sections 1 and 20 of its charter, Sess. Acts 1849, p. 219 *et seq.*; Sess. Acts 1851, p. 272, § 9; R. C. 1855, p. 425, § 29, and p. 438, § 57), to invest that corporation with power to hold real estate: 1st, for the purpose of aiding in the construction of its road, or raising funds to pay debts contracted in its construction; 2d, for depots, road-beds, etc. The company cannot become a large landed proprietor for purposes not connected with its creation. But the amount of lands which it may receive cannot be determined in a suit between private parties. That question can only be raised by the State, in a direct proceeding against the railroad company.—Land v. Coffman, 243.

7. *Railroads — Lands, deeds of, to — Speculation in lands by railroads — Specific performance — Executory contracts.* — Although, in a suit for the specific performance of an executory contract to deed land to a railroad company, the contract may be incapable of enforcement, as being intended for purposes of speculation (see Pacific R.R. Co. v. Seeley, 45 Mo. 212), yet if the deed were in fact made voluntarily, it will be good to pass title.—*Id.*

8. *Railroads — Damages — Delay — Locomotive, etc.* — In an action against a railroad company for damages resulting from its delay in forwarding stock, it is no defense that the delay was caused by the lack on the part of the company of proper appliances for transportation.—Tucker v. Pacific R.R., 385.

9. *Justices' courts — Jurisdiction — Railroads — Contracts of affreightment — Construction of statute.* — Under the existing laws of this State, justices of the peace now have jurisdiction over contracts of affreightment made by railroad companies to the extent of ninety dollars.—Williams v. North Missouri R.R. Co., 433.

10. *Damages — Railroads — Negligence — Trespasses — Contributory negligence.* — Railroad companies are under the same obligations with other persons to use their own property so as not to hurt or injure others, and though a person be injured while unlawfully on their track, or contributes to the injury by his own carelessness or negligence, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, they are liable for damages for the injury.—Brown v. Hann. & St. Jo. R.R. Co., 461.

11. *Railroads - Public and private crossings — Use of the track.* — A railroad company has a right to stop its train at a public crossing for a reasonable time for proper purposes, but passengers are not obliged to wait until the train is removed; and if the passengers are obliged to cross at other points than the public crossing on account of such obstruction, the company is bound to use ordinary care and diligence to prevent injuries to them; and where persons were in the habit of crossing the track at another than the public crossing, the agents and servants of the company were bound to take notice of the fact and use a precaution commensurate with it.—*Id.*

RAILROADS—(*Continued*.

12. *Damages — Negligence — Weight of testimony — Appeal.*—In this State the question of negligence is a question of fact to be submitted to the jury, and the Supreme Court will not decide upon the weight of evidence in such cases.— *Id.*

13. *Lands — Railroads — Platte county — Charter — Title to lands of road, etc.*— Section 8 of the act chartering Platte County Railroad, notwithstanding the language therein employed, did not contemplate the investiture of a technical fee-simple title in that road, of land condemned. Nothing more than an easement passed to the railroad under that act. And the grantor of land, a portion of which had been vested in that road by virtue of statutory condemnation and decree had, prior to the date of the deed, would not be liable to the grantee on his covenant of seizin for the land so appropriated.— Kellogg v. Malin, 496.

14. *Lands — Railroads — Title to — Easement.*—The occupancy of land, under proceedings for condemnation, by a railaoad company, constitutes merely an easement thereon, and not an ownership in fee simple.— *Id.*

15. *Lands, occupancy of by railroads — Encumbrances, covenant against.*— The occupancy of land by a railroad track is such an encumbrance thereon as would render the grantor liable on his covenant against encumbrances. And his liability is not discharged by the fact that the grantee, at the date of the deed, was aware of the existence of the encumbrance.— *Id.*

16. *Court, County — Railroads, subscription to — Agents — Bonds — Reasonable certainty — Statute, compliance with.*—Where a county issues its bonds to a railroad, if there was reasonable certainty in the manner of voting and ordering the subscription, and the subscription was made to the road authorized, and the other provisions of the statute were complied with, such bonds are valid.—Ranney v. Baeder, 600.

RAILROADS, STREET.

1. *Street railroads — Street between tracks, repairs of.*—Under section 3 of the act of March 3d, 1869, regulating the amount of taxes to be paid by street railroads of the city of St. Louis (Sess. Acts 1869, p. 207), corporations having parallel tracks on the same street are not liable for the expense of repairing the street between the tracks.—City of St. Louis v. St. Louis R.R. Co., 94.

See DAMAGES, 2.

REAL ESTATE AGENT.

1. *Sales — Real estate — Commissions, rule touching.*—In suit by a real estate agent for the amount of his commissions, it is immaterial that defendant sold the property and concluded the bargain. If, after the same was placed in plaintiff's hands, the sale was brought about or procured by his advertisements and exertions, he was entitled to his commissions.—Bell v. Kaiser, 150.

RECOGNIZANCE.

See PRACTICE, CRIMINAL, 10, 12.

RECORD.

See EVIDENCE, 11, 22, 23, 26, 31, 33, 35, ; PRACTICE, CIVIL — TRIALS, 15.

RECOUPMENT.

1. Quantum meruit *for work and labor — Action on — Recoupment — Remote damages.*—In an action for work and labor done, only such damages as naturally result from a breach of the contract can be considered by the court in

RECOUPMENT—(*Continued.*)

the way of recoupment; and where the account was for building a fence, defendant could not set up damages suffered by reason of stock breaking through the fence. Such damages were too remote, and could not be set up. Turner v. Gibbs, 556.

REFERENCES.

See PRACTICE, CIVIL—TRIALS, 19.

REGISTRATION.

1. Mandamus—*Registrars, posse to protect—Remedy will not lie—Mandamus* will not lie against the judges of a County Court to compel them to audit for payment the claims of a sheriff's *posse* employed, under the act of 1868 (Wagn. Stat. 1157, § 37), to protect the board of registration in the performance of their duties, before the claims have been reduced to judgment. *Mandamus* is an extraordinary writ, and will issue only when the applicant has no other specific remedy.—Mansfield v. Fuller, 338.

RENT.

See LANDLORD AND TENANT.

REPEAL.

1. *Laws—Repealed by implication, when only.*—Repeals by implication are not favored or allowed unless the first act be so inconsistent as not to stand with the subsequent act.—Glasgow v. Lindell's Heirs, 60.

RES ADJUDICATA.

See JUDGMENTS, 1.

RE-TRIAL.

See EVIDENCE, 1; PRACTICE, CIVIL—APPEAL, 1.

REVENUE.

1. Certiorari—*Tax assessments, appeals from.*—The action of the board of appeals from tax assessments is judicial in its nature, and *certiorari* is the proper mode of reviewing its proceedings.—State of Missouri ex rel. Lathrop v. Dowling, 134.
2. *Revenue—Void assessment*—Certiorari.—The fact that an assessor had no jurisdiction, and that his assessment was void, while it would render the collector personally liable, will not prevent a review of his proceedings by *certiorari.*—*Id.*
3. *Taxation, bank shares subject to.*—The State tax should be assessed directly against the shares of the stockholders in national banks. (Lionberger v. Rowse, 43 Mo. 67; First National Bank v. Meredith, 44 Mo. 500, affirmed.)—*Id.*
4. Certiorari, *object of, etc.*—The writ of *certiorari* is issued to bring up for review the record of the proceedings complained of, and is not a citation to appear and justify the action of the tribunal, as though a judgment were to be rendered against its members.—*Id.*
5. *Revenue—Assessors' board of appeals not called on to justify levy.*—If complaint is made of the object for which taxes are to be collected, it should be by a proceeding against the authority which creates the debt or makes the levy. The assessors' board of appeals cannot be called upon to justify a levy.—*Id.*
6. *Corporation—Revenue—Exemption from taxation—Street improvements, assessments for not taxes.*—Under its charter the Good Samaritan Hospital

REVENUE—(*Continued.*)

was "exempted from taxation of every kind." *Held*, that the exemption did not cover special assessments against the property for improvements of the street fronting it.

Taxes are charges or burdens imposed by the Legislature for public purposes, or to defray necessary expenses of government. But such assessment is not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement.—Sheehan v. Good Samaritan Hospital, 155.

7. *Revenue — Special tax-bills — Collection — General judgment.* — Under a statute which provides that the city engineer shall assess the cost of certain street work against the adjoining property fronting the work done, and that the bill therefor shall be delivered to the contractor, "who shall proceed to collect the same by ordinary process of law in his name, and each certified bill shall be a lien against the lot of ground described therein," the contractor is not entitled to a general judgment and execution against the owner of the land. The term "ordinary process of law" does not mean ordinary personal judgment and execution, but such a process as is adopted to enforce a lien or specific charge upon the property specially assessed. (City of St. Louis v. Clemens, 36 Mo. 467, overruled.)—Neenan v. Smith, 525.

8. *Special tax-bills — Assessment — Construction of statute.* — The requirement of a statute that "each lot shall be charged in proportion to the frontage thereof" does not contemplate that the work in front of each lot shall be necessarily charged to that lot, but the amount of the whole work shall be ascertained, and each lot shall be charged in the proportion that its frontage bears to that of all the lots.—*Id.*

See MANDAMUS, 3; ST. JOSEPH, CITY OF, 1.

ROLL OF JUDGMENT

See JUDGMENT, 8.

RULE OF COURT.

See PRACTICE, CIVIL, 2; PRACTICE, CIVIL—PLEADING, 15.

S

ST. JOSEPH, CITY OF.

1. *Tax bills—St. Joseph, city of — City council — Resolution — Action of mayor.* — Under the amendment to the charter of St. Joseph, approved November 21, 1872, by virtue of which "the mayor and councilmen of the city of St. Joseph" had power to macadamize, etc., streets and alleys, the city council had no power to direct work of such character to be done except when acting in conjunction with the mayor, and a tax bill based on the action of the council alone, without the co-operation of the mayor, would be invalid.—Saxton v. Beach, 488.

SALES.

1. *Auctioneer — Implied warranty — Bill of sale — Presumption derived from signature.* — The mere fact that auctioneers at the time of sale were acting as such is not of itself notice that they were not selling their own goods, and they must be deemed vendors, and responsible as such for the title of the goods sold, unless they disclose at the time of the sale the name of the prin-

SALES—(*Continued.*)

cipal. And the joint signature of the bill of sale by the auctioneer with the principal, will raise a presumption that the auctioneer acted also as principal, which cannot be contradicted by parol evidence that he did not sell or intend to hold himself responsible as principal.—Schell v. Stephens, 375.

See ADMINISTRATION, 3; CARRIERS, COMMON, 2; CONVEYANCES; EQUITY, 12, 13; INFANTS, 2; LIMITATIONS, 13; MORTGAGES AND DEEDS OF TRUST, 11; SALES, JUDICIAL; SHERIFFS' SALES; TRUSTEES' SALES.

SALES, JUDICIAL.

1. *Guardian and ward — Infants — Sale of lands, petition for — Judgments —Evidence.* — The fact that a petition for the sale of lands belonging to an infant is not sworn to, does not make the judgment had thereon void. At best it would only be cause for reversal.—Castleman v. Relfe, 583.

2. *Guardian and ward — Circuit Court — Jurisdiction — Sale of lands — Evidence.* — In an application to a Circuit Court for the sale of lands of infants the court has jurisdiction, and the presumption is that its orders are based upon sufficient testimony. If the evidence is totally insufficient, this would simply constitute an error in the proceedings of the court rendering it; but the judgment would be valid until reversed, annulled or set aside in the proper manner.— *Id.*

3. *Lands, sale of under orders of court — Probate Court — Circuit Court— Approval of report of sale.* —In case of the sale of lands under an order from the Probate Court, the title does not pass until the report of the sale and its approval, and the proceedings are a nullity and no title passes if the report is made and approved at the same term that the sale is made. But in proceedings before the Circuit Court the rule is different. There, notwithstanding such premature report and approval, the title will pass and be good until the sale be set aside or reversed in a direct proceeding for that purpose.—*Id.*

4. *Sales under judgments* — Bona fide *purchaser protected, even if under an erroneous judgment.* — If a sale takes place under an existing judgment, the *bona fide* rights of a stranger acquired under it will not be affected though the judgment be subsequently reversed.—*Id.*

See EXECUTIONS; SHERIFFS' SALES.

SCHOOL DISTRICTS.

1. *Schools, organization of by towns — Construction of statute.* — Under section 1 of article II of the act touching schools (Wagn. Stat. 1262), especially when taken in connection with article I, section 1 of the same act, cities, towns or villages can organize for school purposes without including in such organization the whole sub-district to which it previously belonged.—State of Missouri ex rel. Case v. Searl, 268.

SCHOOL FUNDS.

1. *Counties — School funds — Bonds — Sureties — Construction of statute* — Sections 1 and 2 of the statute relating to sureties (Wagn. Stat. 1302) do not apply to bonds given a county for the use of one of its townships, for school moneys; and it is not necessary, in order to hold sureties liable on such bonds, that suits should be brought against their principals within thirty days after notice given to the county to take that step. The term "person," as used in section 1, does not include counties, notwithstanding the provisions of the act on construction of statutes (Wagn. Stat. 887, § 4). Counties are not properly

SCHOOL FUNDS—(*Continued.*)

bodies corporate as contemplated by that section. Furthermore, counties are not the parties to bring suit, as they have no interest in the school funds. The fact that the bonds for the moneys loaned are made payable to the county gives it no right of action founded upon them.—Cedar County v. Johnson, 225.

SCHOOL LANDS.

See LAND AND LAND TITLES, 1, 3; LIMITATIONS, 5, 6.

SCIRE FACIAS.

See PRACTICE, CRIMINAL, 12.

SHERIFF.

1. *Sheriff — Constitution — Retroactive laws — Vested rights.* — The act of March 23, 1863 (Sess. Acts 1863, p. 20), authorizing the issue of an execution of *venditioni exponas* upon a levy theretofore duly made, with a clause for further levy after exhausting the property levied on, is not retroactive, nor does it divest any vested right, but it is simply in the nature of a remedy to enforce an existing right.—Porter v. Mariner, 364.
2. *Sheriff — Levy — Deed by successor of the term of office.* — Under the act of 1855, touching executions (R. C. 1855, p. 750, § 6; Wagn. Stat. 613, § 61), a sheriff may, after expiration of his term of office, make a deed to land levied on by his predecessor. And he may do so without any order of court.—*Id.*
3. *Execution — Levy, date of prior to that of execution, etc.* — The dating of a levy made under an execution, before the date of the issue of the execution, will not vitiate it.— *Id.*
4. *Sheriff, deed by — Relates back, etc.* — A sheriff's deed relates back to the time of the sale, as to the defendant in the execution and his privies, and as to strangers purchasing with notice, and vests the title in the execution purchaser from that time.— *Id.*
5. *Sheriff — Bonds, official — Re-election — Liability of bondsmen.* — When a sheriff sells property under order of court, but does not receive the money in payment till after his term of office has expired, but was then the sheriff under a new election and had given a new bond, and he fails to pay over the money, *held*, that the liability is determined by the time of the defalcation, and the second bondsmen are liable.— State, to use, etc., v. McCormack, 568.

See MANDAMUS, 4; SHERIFFS' SALES.

SHERIFFS' SALES.

1. *Land titles—Sheriffs—Justice's transcript.*—The sale of real estate upon an execution issued upon a justice's transcript filed in the Circuit Court, passes a perfect title.—Waddell v. Williams, 216.
2. *Sheriff's sale — Justice's transcript — Execution — Validity of purchase — Constable's return — Purchase in trust.*— In a suit for land claimed under sale on execution issued from the Circuit Court on a justice's transcript filed therein, *held:*

   1st. That the failure of the record to show affirmatively that the execution from the justice's court was issued to a constable of the township where the defendant resided (Wagn. Stat. 839, § 14), will not invalidate the title held under the sale in a collateral proceeding. For the purpose of any such proceeding the title is valid, and parol evidence therein to show that at the time

SHERIFFS' SALES—(*Continued.*)

of the issue of the justice's execution and the constable's return, defendant in the execution lived in another township, is improper.

2d. It is not essential to the validity of the execution issued from the Circuit Court, or the sale under it, that the transcript embrace a copy of the execution by the justice and the *nulla bona* return by the constable, where the sheriff's deed recites the fact of such issue and return.

3d. The sheriff's deed need not show that the justice's execution was issued to a constable of the township where the execution-defendant resided.

4th. The title derived from the sale is not invalidated by the fact that the purchase thereat, in its legal operation, resulted in a trust, where the property has not been charged with the trust by proper proceedings. Such trust must be ascertained and declared in equity before it can attach.—*Id.*

3. *Sheriff's deed — Purchase-money — Deed — Vendor.— Semble*, that the delivery of a sheriff's deed and the payment of the purchase-money by the vendor are concurrent acts. The latter is not bound to part with his money until a deed for the premises is tendered.—Shaw v. Potter, 281.

4. *Sheriff's sale — Sheriff agent of both parties — Duties of at sale.*— An officer selling property under execution is the agent of both the plaintiff and defendant, and he is bound to protect the interests of all parties concerned, and is not bound to accept a bid without reserve. If he can see that a sacrifice of property will be prevented by reasonable delay, he may return "no sale" for want of bidders; and especially so on a re-sale, when the time and circumstances are such as to prevent a reasonable competition. (Conway v. Nolte, 11 Mo. 74.)—*Id.*

5. *Sheriff's sale — Purchaser — Deed — Payment.*— The purchaser at a sheriff's sale must pay the purchase-money before he can demand his deed.—*Id.*

6. *Execution sale — Notice of publication — General judgment — Action for money paid — Ignorantia legis.* —An execution under a general judgment which was based on an order of publication alone is void. But where, with full knowledge of the facts and under a misapprehension only as to the law, one procures the issuance of the execution, purchases the property at sale under the execution, and pays the money to the attorney of the execution creditor, the latter is entitled to recover it from his attorney.— Hendrix, Adm'r, v. Wright, 311.

7. *Sheriff's deed — Title conveyed by.*— A sheriff's deed operates only on the existing title, and does not pass a subsequently acquired title.—White v. Davis, 333.

8. *Sheriff's deed — Recitals—Evidence — Clerical error — Diversity of statement in notices.* — A clerical error in a sheriff's deed, by which it was made to recite that the notice of sale was published in "the *Union*," when in fact it was published in "the *Herald*," is not such a substantial misrecital as will destroy the effect of the deed. If the notice was published the requisite length of time, and in a newspaper in compliance with the law, it is sufficient. And a diversity of statement in two notices of the sale, published respectively in English and German, one stating that the sale would take place during the session of the Circuit Court, and the other that it would take place during the session of the Court of Common Pleas, is not such a mistake as would invalidate the sale. If both were regular as to time and place, they imparted full information to those who desired to bid; and a sale when either court was in

SHERIFFS' SALES—(*Continued.*)

session was equally legal. There was no error in substance, and no person could have been misled by the inaccuracy.—Matney v. Graham, 559.

SPECIAL LEGISLATION.

See COURTS, PROBATE, 1; PROBATE COURT OF BOONE COUNTY.

SPECIAL TAXES.

See REVENUE, 6, 7, 8; ST. JOSEPH, CITY OF, 1.

STATUTE, CONSTRUCTION OF.

1. *Statute, construction of — Reference must be had to object of the statute.*— In construing a statute reference must be had to its object, and it will not be presumed that the Legislature attempted to authorize a proceeding unreasonable in itself, unless the intention is indicated in express terms.—Neeman v. Smith, 525.

2. *Special tax-bills—Assessment—Construction of statute.*—The requirement of a statute "that each lot shall be charged in proportion to the frontage thereof" does not contemplate that the work in front of each lot shall be necessarily charged to that lot, but the amount of the whole work shall be ascertained, and each lot shall be charged in the proportion that its frontage bears to that of all the lots.—*Id.*

See ADMINISTRATION, 7, 9 (Wagn. Stat. 88, §§ 33, 34), 8 (Wagn. Stat. 542, § 21).

CARONDELET, CITY OF, 1 (2 Terr. Laws, 343).

COMMISSIONER, COUNTY, 1 (Wagn. Stat. 397, § 14).

CONTRACTS, 4 (Wagn. Stat. 655, § 3).

CORPORATIONS, 1 (Const. art. VIII, § 6; Wagn. Stat. 291, § 13).

DOWER, 2 (R. C. 1845, 430, §§ 3, 5, 6).

EVIDENCE, 1 (Wagn. Stat. 1372, § 1), 16 (Wagn. Stat. 1374, § 8), 22, 26 (Wagn. Stat. 278, §§ 35, 36; *id.* 595, §§ 35, 36), 33 (Sess. Acts 1851, p. 515, § 2).

EXECUTION, 3 (Wagn. Stat. 839, § 14).

HUSBAND AND WIFE, 2 (Wagn. Stat. 936, § 15), 9 (Wagn. Stat. 1001, § 8; Gen. Stat. 1865, p. 651, § 8), 10 (Wagn. Stat. 1036, § 19).

INFANTS, 1 (Sess. Acts 1860-61, p. 98).

JUDGMENT, 8 (Wagn. Stat. 419-20, §§ 7-9).

JURY, 1 (Local Laws 1845, p. 15; Laws applicable to St. Louis County, 210).

JUSTICES' COURTS, 2 (Wagn. Stat. 645, § 16), 3 (Wagn. Stat. 850, § 21), 4 (Wagn. Stat. 344, § 10), 5.

LAND AND LAND TITLES, 11 (Wagn. Stat. 1052, § 53).

LANDLORD AND TENANT, 6 (Wagn. Stat. 879, §§ 10, 11), 10 (Sess. Acts 1869, p. 68, § 13).

LIMITATIONS, 4 (Wagn. Stat. 918, § 10), 5, 6 (Wagn. Stat. 917, § 7), 8 (R. C. 1855, p. 1047, § 2).

MECHANICS' LIEN, 5 (Wagn. Stat. 1001, § 8).

MORTGAGES AND DEEDS OF TRUST, 1 (Wagn. Stat. 94, § 7).

PRACTICE, CIVIL — PLEADING, 9 (Wagn. Stat. 1012, § 3).

PRACTICE, CRIMINAL, 5 (Wagn. Stat. 487, § 16).

PUBLIC PRINTER, 1 (Wagn. Stat. 1337, § 32).

STATUTE, CONSTRUCTION OF—(*Continued.*)

RAILROADS, 1 (Sess. Acts 1851, p. 266), 2 (Sess. Acts 1851, p. 268, § 11; Sess. Acts 1865, p. 107, § 6), 6 (Sess. Acts 1849, p. 216, §§ 1–20; Sess. Acts 1851, p. 272, § 9; Sess. Acts 1855, p. 425, § 29; *id.* 458, § 57).

RAILROADS, STREET, 1 (Sess. Acts 1869, p. 207, § 3).

REGISTRATION, 1 (Wagn. Stat. 1157, § 37).

REPEAL, 1.

SCHOOL DISTRICTS, 1 (Wagn. Stat. 1262, § 1).

SHERIFF, 1 (Sess. Acts 1863, p. 28), 2 (R. C. 1855, p. 750, § 3; Wagn. Stat. 616, § 61).

SURETIES, 2 (Wagn. Stat. 1302, §§ 1, 2; *id.* 887, § 4).

WILLS, 1 (Wagn. Stat. 1366, § 12), 3 (Wagn. Stat. 1372, § 1).

STOCKHOLDER.

See CORPORATIONS, 1, 2.

STREET IMPROVEMENT.

1. *Contracts — Macadamizing — Acceptance of work by board, etc.* — A contract for macadamizing a street provided, among other things, that payment should be made when the work was accepted by the board of public works. *Held*, that the contractor might recover, although a majority of the board neglected or refused to examine or accept the work.—Neenan v. Donoghue, 493.

See REVENUE, 6; ST. JOSEPH, CITY OF, 1.

STREET RAILROADS.

See RAILROADS, STREET.

SUBROGATION.

See ADMINISTRATION, 3; SURETIES, 3.

SUBSCRIPTION.

See RAILROADS, 5, 16.

SURETIES.

1. *Agency—Authority of agent limited to the particular sphere of his employployment.*—An agent authorized in the name of his principal, in connection with the particular business in which his agency was employed, to indorse drafts for collection and deposit on account of such business, or to indorse any draft drawn in favor of his principal in connection with that business, but who is not an unlimited agent, has no authority to indorse a draft not connected with said business, without the knowledge of his principal; and where the proceeds did not come into the hands of his principal, but passed to another party, the principal cannot be held responsible for such proceeds. —Chouteau v. Filley, 174.

2. *Counties — School funds — Bonds — Sureties — Construction of statute.* — Sections 1 and 2 of the statute relating to sureties (Wagn. Stat. 1302) do not apply to bonds given a county for the use of one of its townships, for school moneys; and it is not necessary, in order to hold sureties liable on such bonds, that suits should be brought against their principals within thirty days after notice given to the county to take that step. The term "person," as used in section 1, does not include counties, notwithstanding the provisions of the act on construction of statutes (Wagn. Stat. 887, § 4). Counties are not properly bodies corporate as contemplated by that section. Furthermore, counties are not the parties to bring suit, as they have no interest in the school fund. The

SURETIES—(*Continued.*)

fact that the bonds for the moneys loaned are made payable to the county gives it no right of action founded upon them.—Cedar Co. v. Johnson, 225.

8. *Principal and surety, payment by — Subrogation, etc.* — A surety for the payment of part of the indebtedness of his principal, by paying that sum becomes entitled to a *pro rata*, or proportionate share, with the other creditors, of the proceeds arising from the sale of the debtor's property, and for that purpose may be subrogated to all the rights of the remaining creditors, so as to have the benefit of all the securities which they had.—Allison v Sutherlin, 274.

See SHERIFF, 5.

SURVEYOR.

See EVIDENCE, 6.

T

TAXES.

See REVENUE.

TENANT IN COMMON.

See CONVEYANCES, 12.

TRANSCRIPT.

See EXECUTIONS, 2, 3; PRACTICE, CIVIL, 1.

TRESPASS.

1. *Damages — Employer and contractor — Excavation — Trespass* — Where a contractor, under orders from his employer, attempted to erect a building having a width of sixty-five feet where the building space was but sixty-four feet six inches, and in so doing encroached upon his neighbor's wall, the employer was a co-trespasser, and as responsible as though he himself had made the excavation.—Williamson v. Fischer, 198.

2. *Damages — Crop — Trespass — Measure of damages, etc.*—The grantee of land has no title to a crop cultivated and removed therefrom by a third person. The latter would be a trespasser, but the value of what he removed would not be the measure of damages, and while he harvested the crop he held the actual possession; and, in case the grantee took possession, could have ousted him by an action of forcible entry and detainer, notwithstanding the fact that the person harvesting was a trespasser.— Jenkins v. McCoy, 348.

3. *Trespass — Ownership, actual — Averment of unnecessary.*— In an action for trespass, it is unnecessary for plaintiff to allege that he was at the time in actual possession of the property trespassed upon. But the averment of his ownership is sufficient. Where one has the legal estate in fee in lands, he has the constructive possession unless there is an actual possession in some one else.—Renshaw v. Lloyd, 368.

TROVER.

See MORTGAGES AND DEEDS OF TRUST, 11.

TRUSTS AND TRUSTEES.

1. *Equity — Trusts — A charitable devise will be carried into effect by a court of equity according to its intent.*— The jurisdiction of courts of equity over charitable devises and bequests is derived from their general authority to

TRUSTS AND TRUSTEES—(*Continued.*)

carry into execution the trusts of a will or other instrument according to the intention as expressed by the donor; and if the charity cannot be carried out in the exact mode indicated by the ' ior, or if that mode should become by subsequent circumstances impossib. the general object is not to be defeated if it can in any other way be obtained.—Academy of Visitation v. Clemens, 167.

2. *Equity — Charitable bequests of land intended to last forever cannot be defeated by the heirs at law of the donor.*—Where lands are vested in a corporation by devise for charitable purposes, and it is contemplated by the donor that the charity should last forever, the heirs can never have the lands back again. If it should become impossible to execute the charity as expressed, another charity will be substituted by the court so long as the corporation exests.—*Id.*

3. *Sale of lands — Agency — Suit at law for balance — Statute of frauds — Parol evidence.* — Land was conveyed by deed absolute on its face, and for an alleged valuable consideration, but in fact without consideration, with a verbal agreement that the grantee should sell the land as agent for the grantor and account for the proceeds. *Held*, that the agreement, not being in writing, as required by the statute of frauds (Wagn. Stat. 655, § 8), could not be carried out, and could not be shown in evidence for that purpose. But the agreement would raise an implied trust in the grantee to account for the land and its proceeds to the grantor, and proof of the bargain as showing the last named trust would be competent under the statute of frauds. That act contemplates express and not implied trusts. In such case the grantor might sue for the recovery thereby of the balance of proceeds in the hands of the grantee, declaring upon the agreement merely as inducement, and the cause would be properly submitted to the jury.—Peacock, Adm'r of Maddox, v. Nelson, 256.

4. *Trusts and trustees — Agreement — Expiration of time named in — Creditor unpaid, rights of.*—Where a trustee was created by a certain agreement to sell the property of the debtor and distribute the proceeds among the creditors, and by the terms of the instrument the trust was to continue only two years, a creditor omitted from the general distribution may recover his portion of the proceeds, although the time limited has expired.—Allison v. Sutherlin, 274.

5. *Trustee — Powers, delegation of.*— A trustee or mortgagee cannot act through an agent in the sale of the trust property, unless the deed expressly authorizes him to delegate his powers.—Howard v. Thornton, 291.

6. *Trusts and trustees — Appointment by Legislature — Constitution — Ministerial and judicial appointments.*— Where the original trustee in a deed of trust died, and the Circuit Court of the county was suspended by the Legislature, so that the vacancy could not be supplied by judicial decree, a trustee might, under the old constitution, be appointed by act of the Legislature to carry out the provisions of the trust. Such act was not a retrospective law. Nor was it a legislative judgment or a means of depriving the owner of the land of his property without due process of law.

The general power of the Legislature, independent of the present constitution (art IV, § 27), to appoint trustees to execute trusts, cannot be controverted. They are usually appointed by courts upon judicial inquiry. But where, as in the above case, the act was purely ministerial and *ex parte*, the

TRUSTS AND TRUSTEES—(*Continued.*)

Legislature was (prior to the date of the new constitution) vested with full power to make the appointment. But *contra*, where, in case of a person *sui juris*, the act created the trustee and gave in the first instance the power to sell, the rule is different The enactment, in that state of facts, would clearly transcend the legislative power.— Hindman v. Piper, 292.

7. *Frauds — Trusts — Agency — Purchase by agent, for himself, of the property which was the subject of his agency — Resulting trusts.*— A., residing in Missouri, and B., residing in Illinois, acted as agents for C., also residing in Illinois, in the management of lands in Missouri. A. and B., conspiring together and representing the lands as worth but $20 per acre, obtained a deed from C. at that price, and soon afterwards sold the land for $50 per acre. *Held*, that as A. and B. stood in a confidential relation to C., being his agents for the sale of the land, it was their duty as such to act alone for his benefit; and in making the purchase themselves, at an under-value, they became trustees by implication, holding the title for C.— Hunter v. Hunter, 445.

8. *Co-trustees, liability of.* — Trustees of constructive trusts are only bound for what they realize. They are not jointly bound unless the funds were received by both. Each must account for what comes into his hands.— *Id.*

9. *Equity—Purchase-money for land—Resulting trusts—Fraud against statute.*— Where one purchases land in fraud against an existing statute, and has the title conveyed to another, there is no resulting trust in favor of such purchaser.—Miller v. Davis, 572.

See BILLS AND NOTES, 4; EQUITY, 2, 16; MORTGAGES AND DEEDS OF TRUST; TRUSTEES' SALES.

TRUSTEES' SALES.

1. *Trustee cannot delegate power of sale — Must be present in person.*— A trustee must in person supervise and watch over the sale of the trust property, and adjourn it if necessary, to prevent a sacrifice of the property. And no one can do it in his stead unless empowered thereto in the instrument conferring the trust. A trustee cannot delegate the trust or power of sale to a third person, and a sale executed by such delegated agent is void.— Graham v. King, 22.

See MORTGAGES AND DEEDS OF TRUST, 1, 2.

U

UNLAWFUL DETAINER.

See JUSTICE'S COURT, 2; LANDLORD AND TENANT, 5.

V

VARIANCE.

See EVIDENCE, 24; PRACTICE, CRIMINAL, 12.

VENUE, CHANGE OF.

See PRACTICE, CIVIL, 1.

VERDICT.

See JUDGMENT, 12; PRACTICE, CIVIL — APPEAL, 4; PRACTICE, SUPREME COURT, 3.

W

WARRANTY.

See CONVEYANCES, 10; INSURANCE, FIRE, 1; PRACTICE, CIVIL—ACTIONS, 8; SALES, 1.

WIDOW.

See ADMINISTRATION; DOWER.

WILLS.

1. *Wills, statute of—Destruction and revival of wills.*—Under the law as passed in 1845 (see Wagn. Stat. 1366, § 12), the first will is not revived by the destruction of the last, except where an intention to that effect is expressed at the time of the destruction, or where the first will is republished. —Beaumont v. Keim, 28.

2. *Equity—Guardian and ward—Will—Donation to guardian—Undue influence—Presumption of, how overthrown.*—Any one occupying a fiduciary relation so recently that the influence arising therefrom is presumed still to exist, cannot avail himself of bounty from his late ward, or other persons holding the relation, unless there is clear and distinct evidence that the influence has determined, and that the donor acted in a manner perfectly free, independent and unbiased; and the beneficiary must in all instances furnish this evidence. And the rule holds notwithstanding the fact that such proof is difficult, and perhaps almost impossible, to attain.—Garvin's Adm'r v. Williams, 206.

3. *Wills, proceedings to test—Beneficiaries competent—Witnesses—Construction of statute.*—In proceedings under the statute to test the validity of a will, the beneficiaries under the will are competent witnesses, notwithstanding the provisions of the statute concerning witnesses (Wagn. Stat. 1372, § 1), which provide that where one of the original parties to the contract or cause of action is dead, the other party shall not be permitted to testify. Such actions are in the nature of proceedings *in rem*, and simply amount to a revival of the same matter in the Circuit Court which has been previously had in the County Court. The same legal rules that govern the investigation in the County Court apply in the Circuit Court. The heirs at law and devisees are made nominal parties. But in truth the proceeding is *ex parte* and all are competent witnesses.—*Id.*

4. *Limitations, statute of—Wills—Court, County—Court, Circuit—When it begins to run.*—The law allows five years wherein to contest a will in the Circuit Court, and until that time has passed, the rights under the will are not finally settled, though it is probated in the County Court; and until after that time the statute of limitations does not begin to run against the heirs.—Tapley et al., Adm'rs, v. McPike, 589.

See EVIDENCE, 34; TRUSTS AND TRUSTEES, 1, 2.

WITNESS.

See EVIDENCE, 1, 8, 9, 15; WILLS, 3.